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DEPARTMENT OF DEFENSE ACQUISITION POLICY INITIATIVES

HEARING

BEFORE THE

SUBCOMMITTEE ON
DEFENSE INDUSTRY AND TECHNOLOGY

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

SEPTEMBER 28, 1988

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CONTENTS

CHRONOLOGICAL LIST OF WITNESSES

Page

Spector, Eleanor R., Deputy Assistant Secretary of Defense for Procurement ... 3

Brown, June Gibbs, Inspector General, Department of Defense, accompanied by Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense ... 17

DEPARTMENT OF DEFENSE ACQUISITION POLICY INITIATIVES

WEDNESDAY, SEPTEMBER 28, 1988

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON DEFENSE INDUSTRY AND TECHNOLOGY,
Washington, DC.

The committee met, pursuant to notice, at 9:02 a.m., in room SD-192, Dirksen Senate Office Building, Senator Jeff Bingaman (chairman) presiding.

Present: Senators Bingaman, Levin, Wirth, Gore and Gramm.

Staff present: Jonathan L. Etherton and Sherri Wasserman Goodman, professional staff members; Barbara L. Braucht and Debra A. Rice, staff assistants.

Also present: Edward M. McGaffigan, Jr., assistant to Senator Bingaman; Linda Gustitus and Peter K. Levine, assistants to Senator Levin; Charles C. Smith, assistant to Senator Dixon; Milton T. Beach and Donald A. Mitchell, assistants to Senator Glenn; Leon Fuerth, assistant to Senator Gore; and Mark J. Albrecht, assistant to Senator Wilson.

OPENING STATEMENT BY SENATOR JEFF BINGAMAN, CHAIRMAN

Senator BINGAMAN. Let's get started.

I have just been told that there is going to be a full meeting of the Armed Services Committee at 11, so we might try to get into this and get through by that time if possible.

This morning we continue hearings on the problems of the defense acquisition system. Of course, it has been highlighted by the well-published allegations of fraud in the weapons procurement process.

When Secretary Carlucci appeared before the full committee this summer, he said, and I quote, "The ongoing military procurement investigation understandably raises question about the health of our defense acquisition system," and he also acknowledged that there are deficiencies in how we equip our forces.

He echoed Chairman Nunn's suggestion that major legislative changes should not be made at this time at least until the details of the investigation are made public and a thorough review has been conducted.

The procurement scandal has, of course, deeply shaken the confidence of the American people in the ability of the Department of Defense to provide our men and women in uniform with the most effective weapons at the best price.

The purpose of these hearings is to ensure that the Department vigorously pursues acquisition reform and takes careful and effective action to correct the deficiencies that have been identified.

Although much of the investigation remains confidential, we have learned through our previous hearings that there are problems in the Department's ability to identify and evaluate conflicts of interest by consultants, problems in ensuring that the competitive process is not tainted by improper disclosure of source selection information, and to take prompt and effective remedial action when discovered.

Today we will hear from the Department of Defense on the steps that have been taken to date and plans for further action.

The first witness is Eleanor Spector, the Deputy Assistant Secretary of Defense for Procurement. Mrs. Spector has had a distinguished career in the Department of the Navy and in the office of the Secretary of Defense in a wide variety of acquisition assignments. She has worked closely with this committee over the past few years on the subject of procurement issues, and we look forward to receiving her testimony today on the actions that the Department has taken in light of the scandal.

Following Mrs. Spector's testimony, we will hear from June Gibbs Brown, the Inspector General of the Department of Defense, and Derek J. Vander Schaaf, the Deputy Inspector General.

Mrs. Brown has served as the Inspector General at the Department of the Interior and NASA, so she brings a wealth of experience to the position. And Mr. Vander Schaaf has been a regular witness before this subcommittee. We have found him to be knowledgeable and to be a vigorous advocate for significant improvements in the acquisition process.

Before we start with Mrs. Spector's testimony, let me just defer to my colleague, Senator Gramm, for any statement he would like to make.

Senator GRAMM. Mr. Chairman, let me first say that I appreciate being here, and I think these hearings represent an effort on the part of our committee to understand the procurement process and to improve it. I think it is clear that we have the best defense production and procurement process in the world.

Our objective is not to criticize it but to improve it. Any time there is a perception that we are not getting the maximum return on the taxpayers' dollars, it undercuts the basis of support for a strong America and a strong national defense. And obviously any time we are not getting the maximum return in reality, quite aside from the perception, we are not being good stewards of the taxpayers' money.

So, I think it is vitally important that we do everything we can to improve the system, both to get a better return on our dollar and to maintain the support of the public for our national security and for both those reasons, I am happy to be here today, Mr. Chairman.

Senator BINGAMAN. OK. Thank you very much.

Mrs. Spector, we are glad to have you here.

STATEMENT OF ELEANOR R. SPECTOR, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR PROCUREMENT

Mrs. SPECTOR. Mr. Chairman, I appreciate your invitation to talk to you about the reaction that we have had to the "ill wind" scandal. I will summarize my statement very quickly, and then will respond to your questions.

We are committed, the task force and the Department, to taking whatever actions are necessary to protect the taxpayers' interest and the Department's interest in dealing with contractors who may be tainted by the investigation.

We are, of course, operating with limited information. We only have what is publicly available. We, in acquisition, would like to proceed at a faster pace, but have been inhibited by that limited access to the investigation data. Our goal is to protect the public interest and to treat businesses and industry fairly.

I will just go through some of the new actions that we have taken since our last report to Congress. One is the development of a compendium of the existing laws and regulations on the protection of proprietary business and source selection data.

We have recently made changes in the pre-award certification and clause for use by contractors who are named in the investigation. We put both the clause and the certificate out for public comment. As a result of those comments, we made some changes to them that I think are for the good.

The most major of those changes is to limit their use just to competitive situations since in reality they were both focused on obtaining competitive information.

In addition, we have received about 75 responses to Secretary Carlucci's letter to the top 200 defense contractors on their ethics programs. Virtually everyone who responded does have an ethics program and is reviewing company practices on the use of consultants.

In closing, we have to take decisive action to protect our interests, but I believe we also have to resist the temptation to adopt quick fixes that attack the symptoms and not the root causes of problems.

And we will continue to work with you to make whatever changes are necessary because I agree completely with what you said, Senator Gramm, these sorts of things do undermine support for defense, and I think overall most of the people around us seem to think we have done a very good job in providing for the defense.

[The prepared statement of Mrs. Spector follows:]

PREPARED TESTIMONY OF ELEANOR R. SPECTOR, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR PROCUREMENT

Mr. Chairman, I welcome the opportunity to appear before this committee. I appreciate your invitation to explain the actions the Department of Defense has taken as a result of the Department of Justice's "Operation Ill Wind." We have been limited in our ability to proceed at a faster pace because we have had very limited access to the investigation data. With the exception of the affidavits that were unsealed in Dallas on June 30, those of us who are responsible for reviewing acquisition policy do not have a clear picture of what has occurred. Except for the identification of firms and individuals that have been served search warrants, we still do not know who was involved. Our approach has been limited by the scarce information available to us. We have taken some significant steps, however, and we are committed to taking whatever actions are appropriate as we learn more of the facts from the Department of Justice investigation.

Shortly after the Attorney General told Secretary Carlucci of the investigation on June 13, the Secretary appointed a task force to ensure top level management attention is focused on the investigation findings. This task force is chaired by Dr. Costello, Under Secretary of Defense for Acquisition and Ms. Buck, DOD General Counsel. Mr. Katzen, Assistant Secretary of Defense for Production and Logistics and the Service Acquisition Executives serve as members. The Assistant General Counsel for Logistics and I are heading a working group to assist the task force. We are assisted with support from the military departments.

The United States District Court in Dallas unsealed an affidavit in support of search warrants on July 1. These affidavits contained information which gave us concern as to how the Government's interests were affected. Secretary Carlucci acted cautiously by freezing new contract actions and payments for existing contracts for nine programs mentioned in the affidavits to ensure prudent oversight was being carried out. On July 11, after a detailed review of each affected program indicated that there was no official information to indicate that any current contracts were tainted, the suspension of new awards and contract payments was lifted. Two companies (Varian Continental of Dallas, Texas and Acquisition Control Limited of Alexandria, Virginia) and three individuals were subsequently suspended from Government contracting.

The actions taken by the DOD task force have been carefully measured to ensure that we protect the public interest while striving to treat businesses and individuals fairly. Actions that the task force has taken are as follows:

Issuance of a protocol providing guidance on appropriate actions to be taken when new, official information becomes available.

Development of a compendium of existing laws and regulations on the protection of proprietary business and source selection data.

A relook at "revolving door" enforcement policy.

Issuance of a pre-award certification for use by contractors named in the ongoing investigation to assure they have not improperly or illegally obtained source selection information pertaining to a contract to be awarded. This action was required to assure we do not award any new contracts that are "tainted" while not denying contracts to offerors who are innocent of wrongdoing.

Issuance of a clause for use in contracts with those sources named in the investigation allowing the Government to recover profit should it subsequently be determined the contractor obtained that contract improperly or illegally. After careful consideration of public comments, both the certificate and the profit recapture clause have been revised to apply only to competitive contract awards, since both relate to competitive source selection information.

Modification of the best and final offer [BAFO] process to minimize the use of multiple BAFO's. A policy change has been made requiring high level approval for more than one BAFO. We are also considering proposing a change to the law to allow contract award without discussion and a BAFO to other than the lowest offeror in the competitive range.

Preparation of draft "organizational conflict of interest" clauses to provide uniform FAR coverage to ensure that consultants working for the Department of Defense are not placed in a conflict of interest role with consulting work that they are performing for private firms.

Tightening up of the FAR cost principle on consultants. For consultants employed by defense contractors, current rules already permit us to disallow costs when a consultant was hired to improperly obtain information to gain a competitive advantage. The current principle already requires that consultant costs be reasonable in amount and beneficial to the contract charged. We are considering requiring more details on the consulting agreement and on the work product obtained.

Initiation of a special audit of consulting costs by the Defense Contract Audit Agency [DCAA]. DCAA is auditing certain large defense contractors to determine the nature, extent and costs of consultant services being charged to defense contracts. At the conclusion, we will ask DCAA for suggestions for any further changes to our regulations on consultants.

In addition, Secretary Carlucci sent a letter to the top 200 DOD contractors. (These contractors account for approximately 75 percent of all contract award dollars.) The letter urged these contractors to establish effective ethics programs and to ensure they have in place stringent management controls to avoid improper business practices, particularly relating to the proper use of consultants. The letter also requested they each send the Secretary a report on their ethics programs. To date, we have received approximately 75 responses. These responses indicate that most firms have implemented formal ethics programs. Many of the programs include company-wide training of all personnel, handbooks, and hotlines as well as a requirement for certification by employees that they understand and are in compliance with the ethics program.

We are intent that businesses and individuals must not be treated unfairly merely on the basis of press coverage yet we must take decisive action to reassure Congress and the general public while resisting the temptation to adopt quick fixes that attack symptoms, not the root causes of problems. Changes resulting from the investigation must be improvements to the procurement system, not permanent encumbrances. We will continue to work with Congress to achieve this goal.

Senator BINGAMAN. Let me ask a few questions and then I am sure Senator Gramm will have some.

There is a ban on new individual consultant appointments, as I understand it. Could you describe what the scope of that is? Does the ban prohibit DOD from contracting with individual consultants, with consulting firms? Exactly what is involved in this ban on new individual consultants?

Mrs. SPECTOR. The term "consultants" has been used very broadly by the public, and the press to describe all contract advisory and assistant services. That directive only applied to the rather narrow definition of individual consultants that the Department hires.

There is not a ban on contracting. It is on the hiring of individual consultants which, in fact, is a reasonable thing to do at this point in the administration, not bringing brand new consultants into the Department. It is a rather narrow ban. It is not a ban on contracting with all service contractors.

Senator BINGAMAN. So, you see this as a result of the fact that you are toward the end of an administration rather than the result of this "ill wind" scandal? Is that what you are suggesting?

Mrs. SPECTOR. I would say it is some of both. I don't believe there has been any implication that the people we have hired as consultants are involved in anything to do with this; that the people who we are using in a consultant capacity are involved. So, to that extent, I would say that it is more that it is the end of the administration.

To the extent that consultants are involved, I guess there could be some indications that it is tied to that. But there has not been any evidence indicating that the people we use on the Defense Science Board, or anywhere else we use consultants, have been involved in any behavior that's questionable.

Senator BINGAMAN. On the Competitive Information Certificate, I am still unclear as to exactly what that covers. What the consequences are of providing such a certificate and then you folks finding out that something else has been the case? Exactly what does this Certificate of Competitive Information cover as you understand it?

Mrs. SPECTOR. It allows us to award contracts to the contractors who have been searched. Those are the contractors we are applying it to, and there are 15 of them. The reason we are using it, a rather extraordinary measure, is we know that they were searched. We understand they are in some way implicated. We do not know precisely how they have been involved.

What we have read and what we have seen implies that they were attempting to get source selection sensitive information.

The certificate currently covers source selection sensitive information. It says that you have not received any information related to a source selection that is not publicly available, that is classified but was not given to all sources, that would violate any rule or regulation by your having it when other competitors may not have it.

It is to be signed at a very high level in the corporation, presidential, not lower than one level below the president of the corporation. It provides that the person at that level signs that the company has not obtained any of the information that I referred to relating to this particular source selection.

Senator BINGAMAN. If they had obtained the information related to that source selection which they should not have had——

Mrs. SPECTOR. Yes.

Senator BINGAMAN [continuing]. You presumably have remedies? You have a series of remedies you could take against them once that is made public, so why have them sign another certificate?

Mrs. SPECTOR. What the certificate really does is specify if you have gotten such information, list it for us, tell us where you got it, and you might get an award anyway because——

Senator BINGAMAN. Has anybody done that?

Mrs. SPECTOR. Yes, I believe we have gotten listings of information from contractors. What we can do, as an example, let us say they have gotten a source selection plan or something they ought not have had. Perhaps we can make it available to all the other bidders and hence equalize the effect.

Let us say they got something early which gave them more time. We can extend the time for everybody on that solicitation. There are some ways, if we know the information, that we can equalize its impact and award to the contractor anyway.

Senator BINGAMAN. But I understand this is essentially a certificate that the contractor does not have information about this contract or this source selection which they should not have.

Mrs. SPECTOR. That nobody else has. That would give them an unfair competitive advantage.

Senator BINGAMAN. And it would strike me as odd for a contractor to go ahead and sign a certificate saying yes, I do have information that gives me an unfair competitive advantage, and here is what it is.

Mrs. SPECTOR. Effectively it is not that odd. We are dealing with the information we believe may have been gathered at very low levels. At the very highest level it could be, if they tell us what information it is, something that we can offer to everybody else.

If they have, for instance, an internal government estimate of what the program ought to cost, we could, I suppose make that available to everybody and proceed with the procurement. If they have the other people's bids, the numbers, if that is the information, presumably they would withdraw from the competition at that point or, again, conceivably they would tell us and we could equalize the impact of that, make that information available to everybody.

The goal is not to enter a tainted contract. It is not punitive. It is to have them tell us that this award that we are about to make is not going to result in the award of a tainted contract. That is really what we are after because we have no way of knowing other than that this particular contractor was implicated somehow.

We do not have any other information except what they tell us. If they tell us there is no information on this contract, we will award to them. If they provide it, we might try to still award to them, but make the information available to everybody.

Senator BINGAMAN. My time on the first round is up. Senator Gramm.

Senator GRAMM. Thank you, Mr. Chairman.

Mrs. Spector, in your written testimony you talk about the possibility of relooking at the revolving door issue. As you are aware, we have spent many hours in conference with the House on that issue.

There are two views in the Congress on this issue. One is that anyone who comes to work for the Federal Government should take vows and enter into a monastery and never be in any productive segment of society again.

The other view——

Senator BINGAMAN. That is what you would advise. [Laughter.]

Senator GRAMM. That is right.

The other view of the revolving door issue is a concern that, especially at the middle levels of appointments where someone is unlikely to get his name in the paper unless he really messes something up—he is certainly not going to get his name in the paper for doing a great job—if we eliminate or reduce the marketability of the skills they acquire once they leave the Government, that we are going to eliminate a primary reason for many of these people coming to the Government.

It is an age-old process here where the young, bright lawyer or CPA comes to work for the IRS, learns how the IRS works, does a great job for the IRS in the process and then goes out and gets rich in telling everybody else how to deal with the IRS.

So, obviously we have spent many hours in conference with the House on this issue, and I wanted to ask you two questions. Number one, based on what you have seen so far in looking at the problem that is being analyzed, do you see evidences of a so-called revolving door problem?

Mrs. SPECTOR. I have to say, Senator Gramm, revolving door is not my immediate area of overview or expertise. It is not directly a procurement matter. I have not observed serious problems with the revolving door. But, again, I am not overseeing that.

I do think that making it very difficult or unpleasant for productive people in industry to come into the Government would be a serious problem for Government. We need to get the best and the brightest people, and to say that they could never go back to a job where they earn a reasonable income in their area of expertise would probably be a mistake.

I believe you would have to get our legal people who oversee this area to answer that question more definitively than I just have.

Senator GRAMM. Thank you, Mr. Chairman.

Senator BINGAMAN. Mrs. Spector, let me ask about this profit recapture issue.

Under what circumstances would DOD, or does DOD, attempt to recover profits for illegal or improper activity in the obtaining of a contract?

Do you have authority to recover profits and do you actually exercise that authority?

Mrs. **Spector**. Right now we believe we have the authority to recover profits on the contracts where we have put this clause into effect. We do have the right, if a contractor is convicted of bribery or conflict of interest, to rescind the contract.

We also have the right, in the absence of the conviction after notice and a hearing, to terminate the contract on the basis of a determination by the Secretary of Defense.

Given that we have that right, we believe in cases where that is impossible, where the contract has proceeded to a point that it would be a terrible loss of money to do so or where it is the only source at that point, that the recapture of the anticipated profit going in would be a fair and equitable way to assure that he didn't receive any ill-gotten gains on a tainted contract, though presumably the person who signed the certificate was unaware that that was the case.

So, we believe it has a place on these kinds of contracts.

Senator **Bingaman**. And you believe you have that authority now by virtue of a clause you are putting in those contracts?

Mrs. **Spector**. Yes, sir. We have the right to terminate the contract or rescind the contract, if you will, as a lesser penalty. That is defined up front. If, again, information becomes available to us that indicates that there was a problem on the contract unbeknownst to the signer of the certificate.

Senator **Bingaman**. I know, but terminating a contract is a lot different than recapture of the profit obtained by the contractor pursuant to the contract.

Mrs. **Spector**. Presumably, if we were not to terminate, we would seek to negotiate a reduction in the price of the contract.

There are cases where it would be very difficult or costly to terminate the contract. If the conviction occurs 3 years from now on a contract that is issued now, for instance, the products are all delivered, we would, at that point, in the normal course of things, attempt to negotiate a reduction in the price of the contract.

This more clearly defines the reduction that we would seek. The profit that is anticipated going into the contract is the reduction that we would seek if it is subsequently determined the contractor obtained the contract in an illegal fashion.

Senator **Bingaman**. Do you need a statute or do you have or need legal authority now, regardless of what you have in the contract between DOD and the defense contractor, which says anytime the Department of Defense determines that a contract was obtained illegally or based on illegally obtained information, the Department of Defense can go in and recover, through a court proceeding or some other method, the ill-gotten profit?

Mrs. **Spector**. I guess until we have a little more experience to see how this works, I do not know that we need additional legal authority. It will depend on whether we are challenged in court on this. We believe currently we have the authority to do it.

Now, until we get more experience it is not something I necessarily believe we would want to threaten all of our contractors with. We sign contracts with ethical contractors who are responsible and honest, and in most cases the threat of taking back profit is not something that necessarily belongs in every single contract.

Senator Bingaman. No, I am not suggesting you put it in every contract. I am suggesting that a statute could be written which would say regardless of what the contractual provisions between the Government and a contractor are, the Government always has the right to go in and recover profit where it is determined that——

Mrs. Spector. I am not certain right now, Senator Bingaman, that we do need that law, but I would like to be able to get back to you on that after we see how this works and if we are challenged, to see if we need additional laws on that. Right now we do not think so.

Senator Bingaman. How do contractors protect themselves? If you determine that they have gotten illegal profit or they have obtained profits from a contract that they obtained illegally, what rights does a contractor have to question that or to obtain a hearing and try to make the case that they did obtain the contract legally?

Mrs. Spector. We have provided in the new clause that we issued on profit recovery, that there would be a hearing. First of all, we would tell them the amount that we thought was included for profit on a fixed-price contract, for instance. It is defined in the contract on a cost type or a fixed-price incentive, how much the going-in target profits were. On a fixed-price contract it is not necessarily agreed to.

First, the contracting officer would notify the contractor as to how much he or she thought was in. The contractor has a right to then come back and say that is the agreed amount.

After we determine how much should be taken back, the contractor has a right to a hearing or to come in and present why he doesn't agree, and we will certainly listen to that, and there is the right to a hearing before we take back any profit.

Senator Bingaman. Does he have any right to any independent review of your determination to take back that profit?

Mrs. Spector. Absolutely. Yes, he does.

Senator Bingaman. By whom?

Mrs. Spector. I am sorry, I do not——

Senator Bingaman. Independent review, I mean, who second-guesses you on whether or not his profit ought to be taken?

Mrs. Spector. The contractor would come back and would have the right to have anybody come back representing him, be it a lawyer or whomever he chooses to rebut our position on whether or not we can take that.

Senator Bingaman. But who makes the ultimate decision?

Mrs. Spector. The Secretary of Defense.

Senator Bingaman. The Secretary of Defense is the ultimate arbiter?

Mrs. Spector. Yes.

Senator Bingaman. He has no right to go to court and ask a judge to determine that?

Mrs. Spector. Of course he has the right, then, after that decision is made, if it is made unilaterally. If it is not a bilateral agreement, he certainly can go to court and challenge it.

I might also say we do not intend to use this capriciously. It would be done at a time where a contractor is either close to or has been found guilty of illegally containing the contract, at which point we believe it would be in the contractor's interest as well as ours to negotiate a reduction and get on with the contract. If there is a determination that it is not a good idea to terminate the contract, then we would negotiate the reduction and get on with it.

And we think at that point the contractor will not be disputing it as vociferously as if we did it just arbitrarily with very little evidence. We would not do this capriciously. We have no intention of doing that. It requires very high level approval to do it.

Senator BINGAMAN. One of the things that the Department of Defense task force on defense procurement said in their report in July was that they have a special audit task force established. Could you just give me a little brief summary of the status of that, please.

Mrs. SPECTOR. Yes, I can. The status now is—I am just looking at the number of companies—they are looking at the 12 largest contractors at 60 sites on the use of consultants, what they are used for, what kinds of agreements exist with them, what work products they deliver, how much they are used, what the type of work is, and as a result of this, DCAA will report to us whether they feel there are additional changes needed in our rules.

I might mention we already have at the Civilian Agency Council a change in the cost principle on consultants that would mandate additional looks at work products and at consultant agreements.

Senator BINGAMAN. My time has expired. Senator Levin has come in. Did you have some questions at this time?

Senator LEVIN. No.

Senator BINGAMAN. Go right ahead, and then I will call on Phil again.

Senator LEVIN. I will be happy to yield to Senator Gramm.

Senator GRAMM. I have already had one round, Carl. Go ahead.

Senator LEVIN. Mrs. Spector, I am interested in this pre-award certification that you have adopted for use by the contractors that are named in the ongoing investigation to assure that they have not improperly or illegally obtained source selection information which should not be available to them.

As I understand, the original certificate was amended, is that correct?

Mrs. SPECTOR. Yes, sir.

Senator LEVIN. The original certificate included information that pertained to acquisition plans, source selection plans, technical evaluation plans, and internal government estimates, and those items were left out of the final certificate. Is that true?

Mrs. SPECTOR. They were referred to generically. One of the major criticisms of the original certificate was it was terribly broad-sweeping and involved information that may have been generally available that the contractors felt there was no prohibition on having. It required very, very long listings.

What the new certificate basically says is that the offeror has not knowingly obtained, directly or indirectly from the Government, any information that they believe is not available to other offerors, any information on another offeror's proposal, anything that has been marked proprietary from another offeror, anything that is classified or source selection sensitive.

Now, source selection sensitive would pull in a number of the items to which you just referred. What we are effectively doing is referring to them generically, and then we have a sweep-in that says anything else that under the circumstances would otherwise violate law or regulation. So, for us it is arguable that this is an even broader coverage, and it puts it up to the contractor to decide what information he ought not to have had that would fall into these areas.

Senator LEVIN. Well, my question is, though, Is it legal for a contractor to have those four items?

Mrs. SPECTOR. It could be. There are times that it could be if it was made available to everybody for some reason.

Senator LEVIN. Other than that?

Mrs. SPECTOR. Depending upon the timing. If it were, for instance, a Government estimate on an earlier version on something else—it is very difficult to conjure up the defenses that may be provided for having this sort of information.

Senator LEVIN. Is there an area of ambiguity here?

Mrs. SPECTOR. It depends on the circumstances surrounding the information.

Senator LEVIN. Do you believe there is an area of ambiguity?

Mrs. SPECTOR. I believe it is very difficult to define what you absolutely never may have in any circumstances. That is a difficult thing to define. We have been wrestling with that. We would like to come up with that. In fact, we are asking industry to say what information that we say you cannot have, do you think you ought to have?

We are asking them what information should be made more available.

Senator LEVIN. Well, is it accurate to say that there is some uncertainty as to whether or not there should be access to certain types of information?

Mrs. SPECTOR. I would say——

Senator LEVIN. Whether or not it is inside information or not?

Mrs. SPECTOR. Yes, I would say there is, particularly given the timing of when and from whom they obtained it. Yes, there could be some ambiguity on that. It is a very difficult thing to define other than by these generic categories.

Senator LEVIN. Is there uncertainty in the Department about it?

Mrs. SPECTOR. You know it when you see it, is what I can tell you. If you told me what it was, I could say yes, you should not have that, or that is OK to have.

Senator LEVIN. Is there uncertainty as to how to define it for the purpose of regulation?

Mrs. SPECTOR. Very specifically we ran into problems with our old definition, where there were circumstances brought to our attention where things could be allowable, where it was OK to have certain pieces of information.

We felt these generic descriptions were far better, more precise, that any information you have on someone else's proprietary proposal before the award of this contract, relating to this contract, is something you ought not have, period. It is marked proprietary. No matter how you got it, we want to know about it.

Senator LEVIN. I gather that your answer is there is some uncertainty in the Department as to how to write out a regulation which covers the material you want.

Mrs. SPECTOR. I believe we feel we have done it reasonably well now. I think when you list it by name——

Senator LEVIN. So, this is what you believe with some clarity the Department believes is inside information?

Mrs. SPECTOR. This that we have currently defined, yes, sir.

Senator LEVIN. And why do you not apply it to all companies?

Mrs. SPECTOR. It is applied to all. All companies cannot have this information. It is already prohibited.

Senator LEVIN. No, I mean this certification.

Mrs. SPECTOR. Because no company should have this kind of information.

Senator LEVIN. My question is why do you not require all companies?

Mrs. SPECTOR. Yes. The answer to that is that we only applied the certification to companies where we have indications that they may have this kind of information.

Senator LEVIN. That is not the point. You finally have defined what is inside information and what is not. I have got to tell you, I think there has been a real failure in terms of defining that thing properly and in a timely way, and there is a lot of confusion out there. But if you have finally done it, you now say this is it, you have really done it, why not require all companies to certify that? Why not send it out to every company and say this is the definitive definition of what is inside information?

You have not done that. You have just asked 16 companies.

Mrs. SPECTOR. That is correct.

Senator LEVIN. Why not?

Mrs. SPECTOR. Because we believe that the remainder of the companies are honest, and we have no reason to question their honesty in this regard.

Senator LEVIN. But there is so much confusion there about what is inside information and what is not, and if you have come up with a definitive definition, why not dispel the confusion and send out your definition to everybody?

Mrs. SPECTOR. Sir, you know, I am not sure there is that much confusion. I honestly believe that a definition as glib as "anything you would have hidden when the FBI search party came in to check you," is the kind of information we want. You cannot put that in a certificate.

We have tried to define it by saying information on someone else's proposal. It is already prohibited to have that. If we find it, we will either debar them or not award them a contract or take some other action.

In this case, we are in a limbo situation of not knowing what they have or if they have anything, and we need it to prevent the award of tainted contracts. We normally do not have the suspicion that we are awarding tainted contracts. We believe in our system.

Senator LEVIN. My time is up.

Mrs. SPECTOR. Our system is sufficiently good, that we do not need it for all 15 million actions that we award competitively every year.

Senator LEVIN. I am not suggesting that. I am just suggesting you get a certification from each contractor or at the minimum that you hand this out to every contractor and tell them this is now your clear definition of what constitutes inside information. We have done a lot of digging——

Mrs. SPECTOR. Perhaps we can do that.

Senator LEVIN. All I can tell you is there is a lot of uncertainty there. You have people, honest, legitimate contractors, who will say it is perfectly proper for me to have that document. You have other contractors who say no way could I have that document proper. I am talking about legitimate contractors who are disagreeing as to whether or not they are supposed to have certain kinds of information.

So, if you think there is no uncertainty out there——

Mrs. SPECTOR. No, I do not think there is no uncertainty. I know there is.

Senator LEVIN. I think the Department has helped to breed it by a failure to define with some clarity what is or is not inside information which should not be in anyone's possession.

Mrs. SPECTOR. I think we have gotten that down. Do you think this definition comes pretty close? I think it approaches that. You still have to decide if what you have is information on another person's proposal for this procurement. You still have to make some judgments of what you have. But this pretty clearly defines what you ought not to have, I believe, in the revised certificate.

Senator BINGAMAN. Senator Gramm.

Senator GRAMM. Mrs. Spector, you point out in your testimony that you are working on new provisions related to conflict of interest. Could you give us some of the broad parameters of what you are looking at?

Mrs. SPECTOR. In the award of any contract for advisory assistance services, we would ask the contractors to state if they were doing business with anybody related to a program involved with what they were researching, and if they were they would have to tell us about it and what the nature of their business was on that particular program.

We are looking into whether we should extend that to a financial kind of interest by the participant and that may be an option that we have as well.

Senator GRAMM. Based on the amount of information that you have to this point, do you believe that there are major conflicts of interest involving consultants?

Mrs. SPECTOR. I do not think so with the people that we are employing directly. This kind of clause has been used at the local service level. The Air Force and the Navy have used it extensively for many years. What we are really doing now is getting uniform FAR coverage on this issue.

We have not had indications that the people who we are dealing with, the advisory and assistance firms, services firms, have conflict of interest problems. There is no broad evidence that I have seen. It may be a question you would want to address to our Inspector General.

I have not seen that as a major problem area, but it clearly is one that ought to be tightened up in the face, certainly, of this investigation.

Senator **Gramm**. Thank you, Mr. Chairman.

Senator **Bingaman**. I would like to ask a question on this announcement that you folks made in July about the best and final offer issue.

As I understand it, you made a policy change at that time, indicating that senior level approval would be required if there was to be more than one best and final offer. I would like to know first if that policy has actually been implemented?

Second, in your testimony you say that you are considering proposing a change in the law to allow a contract award without discussion and without any best and final offer, just allowing the award to the lowest offeror. I would be interested in what the status of that is, if you have made progress in implementing that?

Mrs. **Spector**. Yes, we have had to get high level approval for more than one best and final offer.

The background on the law and why there have been more best and final offers since the advent of the Competition-in-Contracting Act is that CICA made a slight word change. Prior to CICA, we could award without discussions and a BAFO if we were getting a reasonable price or a reasonable cost.

The wording was changed to say, without discussions with offerors, when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with product or service that acceptance of the initial proposal would result in the lowest overall cost, then we can go without a BAFO.

GAO interpretation has been, the lowest overall cost is the low bidder, the low qualified bidder. There are many occasions where we do not want to go to the low bidder.

One example I will give you is, the second low bidder might be just a few dollars more and have a substantially higher technical score. We can award to him as long as we have discussions and a BAFO.

We are considering proposing a law change that would effectively change the wording back to what it was pre-CICA, because I believe this was an inadvertent change, that would say as long as the Government gets a reasonable price, you can award without a BAFO and discussions. Did that fully answer your question, sir?

Senator **Bingaman**. Yes, I guess it did. Let me make sure it is clear, though. You now have in place this policy where only one best and final offer is permitted without senior——

Mrs. **Spector**. Yes, Service Acquisition Executive approval.

Senator **Gramm**. And is that working well? Has that helped? Do these people have 2,000 of these every Monday morning when they open their mail?

Mrs. **Spector**. Not that I am aware of. We have not actually received a status report from them yet. Though they are supposed to report to us, I have not received the first report yet, so I do not know precisely if there are a number of them. I suspect there are some.

There is a need for more than one best and final offer in some cases. The requirements change, the budget will change between the first and the second. There are a lot of circumstances that could provoke a second best and final offer.

Senator GRAMM. When would you expect to be able to advise the Congress as to whether you support this suggested change in CICA?

Mrs. SPECTOR. I would think by the early part of the next Congress we could advise you as to whether or not that change would be a good one. I lean toward it being a good one, a change that would be a positive one to make. The change was probably unintentional in CICA.

Senator BINGAMAN. OK. Senator Levin.

Senator LEVIN. I thank you, Mr. Chairman. Your definition of inside information basically is, as I understand it, both from Mr. Tippich and in your testimony here this morning, information on somebody else's proposal.

Mrs. SPECTOR. Information on somebody else's proposal that is either marked proprietary, source selection sensitive, our information that is source selection sensitive as well is included, or information that you are otherwise prohibited from having by law or regulation. And your lawyers, I presume, have to advise you on what that is.

Senator LEVIN. Let me try to be more specific, then. What about the POM's and the PED's, which I understand are budget and planning data based. Are POM's and PED's inside information that you are not supposed to have?

Mrs. SPECTOR. The answer that I learned when I was in cost estimating was yes. But we are not supposed to promulgate——

Senator LEVIN. What is the answer that you now believe?

Mrs. SPECTOR. I believe that we probably ought not give that out. I will tell you why.

Senator LEVIN. Probably ought not?

Mrs. SPECTOR. It is not my area of expertise, truthfully. It is not a procurement area. The fact is, though, we normally give out information that supports the President's budget. The POM is a planning kind of a document. It does not necessarily support what the President will come forward with. With that in mind, it ought not be given out publicly.

Senator LEVIN. Do you know whether or not it has been given out?

Mrs. SPECTOR. I do not know. I have never given it out myself.

Senator LEVIN. Do you know whether it is prohibited from being given out.

Mrs. SPECTOR. I am not up on those laws. It was prohibited in regulation, as far as I was concerned. When I had access to it, it was prohibited to give it to anybody outside the Department.

Senator LEVIN. But you are not sure if it is, in fact, currently prohibited or not?

Mrs. SPECTOR. Sir, only because it is not my area of expertise and I do not know if there have been any changes in rules. I dealt with that area when I was in cost analysis, which is now 4 years ago. That is why I do not know. I am not an expert witness, if you will, on that subject.

Senator LEVIN. Do you know whether or not the industry thinks it is clear whether or not they are supposed to have that planning and budget data?

Mrs. SPECTOR. I do not know.

Senator LEVIN. You have not heard anything about the lack of clarity on the part of the DOD, relative to that data; whether industry should have it?

Mrs. SPECTOR. Of course I have read things to that effect in the newspapers.

Senator LEVIN. Other than that, there has been no discussion that you have known about in the DOD relative to that?

Mrs. SPECTOR. It is not something contractors would normally discuss with me because it is not strictly a procurement policy matter.

Senator LEVIN. You have not participated in or heard any discussions inside of the DOD relative to whether that material should be available to contractors?

Mrs. SPECTOR. No, sir. Not official discussion.

Senator LEVIN. What was the reason the items were dropped, that I referred to before, from the original certificate to the final certificate?

Mrs. SPECTOR. Because one could conceive of situations where it would be perfectly acceptable to have those documents and contractors felt that it was unreasonable to ask the source of all of them if it was perfectly acceptable for them to have them.

We felt these generic descriptions were more appropriate than listing specific documents that may or may not be appropriate to possess.

Senator LEVIN. The items I mentioned were information pertaining to acquisition plans, source selection plans, technical evaluation plans and internal government estimates. None of that is information on somebody else's proposal?

Mrs. SPECTOR. It is information that would be marked Source Selection Sensitive. I believe virtually all of the documents that you named that were in the former certificate would fall into that category.

Senator LEVIN. It could be marked that way?

Mrs. SPECTOR. Yes, sir. Normally they are marked in one of those ways.

Senator LEVIN. To sum up, this new definition, this new certificate with that one exception, does not cover any information other than information on somebody else's proposal?

Mrs. SPECTOR. No, that is not precisely correct. There are four exceptions. The last is the disclosure of which to the offerer or potential offerer by a Government employee would, under the circumstances, otherwise violate law or regulation. So that is kind of a catch all, that if it would violate law or regulation to have it, that you should tell us about it does not necessarily mean that you will be denied the award of this contract.

Senator LEVIN. It is an awfully broad catch all. It covers everything.

Mrs. SPECTOR. Yes, it does. We intended it to.

Senator LEVIN. Well then, you might as well just have a certificate with that catch all. I mean, were not those other items covered by law or regulation that are specified in the certificate?

Mrs. SPECTOR. Yes.

Senator LEVIN. No, the ones that you have specified in this certificate. Are they not covered by law or regulation, even without certificate, are not the items specified in there prohibited by law or regulation?

Mrs. SPECTOR. By regulation. By and large they are. The contractors had questions in certain cases as to whether or not, as you suggest, it would be appropriate.

This says you have to use your judgment as to whether or not it is appropriate to have the information, and if in doubt, the instruction says tell us what you have. If there is any doubt on it, explain to us what you have.

Senator LEVIN. So there is a lot left to the contractor's judgment.

Mrs. SPECTOR. There needs to be, sir.

Senator LEVIN. Thank you, Mr. Chairman.

Senator BINGAMAN. Thank you. Mrs. Spector, we appreciate your testimony very much. We have, as I indicated before you walked in, Senator Levin, a full committee hearing at 11 o'clock, so we will go on to the Inspector General and the Deputy Inspector General and hear their testimony at this time.

Ms. Brown, we are glad to have you here, and Mr. Vander Schaaf, if you would just go ahead with your testimony, we will then have some questions.

STATEMENT OF JUNE GIBBS BROWN, INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, ACCOMPANIED BY DEREK J. VANDER SCHAAF, DEPUTY INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Ms. BROWN. Mr. Chairman, members of the subcommittee, I am pleased to participate in today's hearing on DOD acquisition issues. My deputy, Mr. Derek Vander Schaaf, is accompanying me. He will lend his expertise to the discussions.

The disclosures earlier this year of the investigation into the apparent misuse of contractor proprietary data and the alleged bribery of government officials has deeply alarmed the Congress as well as the public.

I can assure you, from my first hand observations, that the Department of Defense is equally concerned and has strongly supported the thorough investigations of the Department of Justice, the FBI, the Naval Investigation Service and my office.

Like you, I await the conclusion of the investigation and the grand jury proceedings so that the full facts surrounding these cases and issues can become public knowledge.

In the meantime, the Secretary has moved very decisively with a series of actions to safeguard DOD from any further criminal activity. The other DOD official who is testifying today, Mrs. Spector, has elaborated on the rationale for each of her actions. However, your invitation to me included a request that I also comment on some of those measures.

At the onset, I want to make it clear that Secretary Carlucci has ensured my full awareness of the alternative actions being considered in response to the disclosures so far.

In my statutory role as his chief advisor on fraud matters, I have met with him frequently. For the first month we met on a daily basis to discuss the progress of the investigation and what information was becoming available on their results.

The heads of the special task force which he established to formulate corrective action, Dr. Costello and Mrs. Buck, also attended or met with me separately. I have been able to offer my insights, based on my experience as IG at three agencies, in that decisionmaking process.

Given the facts available at DOD and to me when each of the corrective measures were decided upon, I had no objection to them or to their recent adjustments. I continue to support the Secretary's actions as reasonable interim measures.

Clearly, both the executive branch and the Congress will wish to explore the results of the investigations in great depth, but it will be some months before enough information is on hand to do that in a definitive way. Several of the issues are both complex and controversial and will not lend themselves to a quick solution.

I would like to applaud the subcommittee's initiatives, earlier this year, to foster a productive dialogue between industry, DOD and the Congress regarding a wide range of acquisition issues. Without a doubt, the Government cannot unilaterally solve problems such as the misuse of competitor's proprietary data and conflicts of interest among consultants.

As the initial disclosures occurred, it was necessary for the DOD to act immediately. While detailed discussions with industry were impractical at that point, I believe it is now incumbent upon both the Government and industry to work together toward effective long term solutions.

Mr. Chairman, your invitation letter requested that I comment on a variety of other matters related to DOD and the acquisition process. I have done so in some detail in my full written statement, and I will mention just a few of those key points.

The "Ill Wind" revelations have focused new attention on many issues relating to the use of consultants by both Government and industry. The other statutory IG's and I have completed the first of a series of coordinated Governmentwide reviews involving this matter, and we are making several recommendations to agency heads and to the OMB.

Relative to work force quality, I doubt that any serious observer believes that there are more than a few criminally inclined individuals among the tens of thousands of DOD acquisition personnel. That there are any, of course, is intolerable, and we will spare no effort to expose them.

Nevertheless, the chief causes of waste in the acquisition process are error and indifference, not crime. The basic causes of this error and indifference are inadequate training, excessive turnover, poor morale, and the increasing difficulty in attracting top quality people to public service.

I would like to commend you, Mr. Chairman, for bill S. 2530, the Federal Personnel Improvement Act, which will help Federal managers to cope with these problems. I support that bill and the various measures already being taken by DOD to improve professionalism and to train effective procurement personnel.

Another problem area pertains to duplicative contractor oversight and the resulting inefficiency. To be perfectly candid, there has been virtually no further progress made by DOD in streamlining the oversight process since Mr. Vander Schaaf described some limited DOD accomplishments to you last spring.

That is very disappointing, and I am pessimistic about how much progress the DOD will be able to report to Congress by December 1988, when the duplicative oversight report is required by law. Meanwhile the DCAA is underresourced to carry out several key aspects of its mission.

In my statement I have addressed the issue of DOD not using all of its existing authority. By and large, the Department already has ample authority to address the most persistent acquisition problems. There are several areas, however, in which I do not think the Department has used its existing authority aggressively enough.

One of those areas pertains to the Defense Acquisition Regulation changes. In some cases, organizational or procedural obstacles exist, even though they limit the effective use of authority by senior officials.

A good example is the Defense Acquisition Regulation Council process. The Council is very slow to act and has, in some cases, thwarted top DOD management initiatives. In my statement I give a number of examples where necessary action on very important issues has been untimely, inadequate, or both.

A second example concerns the weapons system acquisition decisions. I believe that the Under Secretary of Defense for Acquisition and the Defense Acquisition Board have sufficient authority to manage the major weapons system acquisition process in a vigorous and effective manner.

Although improvements have been made, our reviews indicate that certain problems still exists. Compliance with procedural improvements recommended in previous audit reports remains incomplete. We intend to continue a systematic audit program to audit the major weapons system programs as they progress through key stages.

We will advise top DOD management whenever we find that the data needed for fully informed decision-making for those programs are inadequate.

The third area of concern regards component breakout. I believe that better definition is needed in the DFARS of when an analysis of system component breakout for competition is appropriate and what the parameters of such an analysis should be.

In reviewing reports issued by my office on major acquisition programs within the past 2 years, it is significant that inadequate component breakout analysis is the most frequent finding.

I have recommended to the Under Secretary for Acquisition that the need for better policy guidance in this area must be addressed. Increasing competition at the system component level can often result in very significant savings.

The fourth area is defective pricing. The Department has not used the protections afforded the Government in the Truth in Negotiations Act to the full extent intended by Congress. The Department needs to take a number of actions, and I have detailed those in my full statement.

It is especially important that the increasingly liberal interpretations of what constitutes "adequate price competition" should be avoided, for they are merely resulting in more and more contracts that are not being covered by the Truth in Negotiations Act. Recent Navy actions to restrict the contracting officer's ability to get cost and pricing data are especially ill-advised.

In summary, Mr. Chairman, I have attempted, both now and in my written statement, to respond to the issues raised in your invitation letter. I would like to emphasize that my staff and I are available to help the Congress further explore each of these issues. We would be glad to take any questions.

[The prepared statement of June Gibbs Brown follows:]

STATEMENT BY
HONORABLE JUNE GIBBS BROWN
INSPECTOR GENERAL, DEPARTMENT OF DEFENSE
ON DEFENSE ACQUISITION

Mr. Chairman and Members of the Subcommittee, I am pleased to participate in today's hearing on DoD acquisition issues. My Deputy, Mr. Derek J. Vander Schaaf, is accompanying me this morning to lend his expertise to the discussions as well.

ACTIONS TAKEN AFTER ILL WIND

The disclosures earlier this year of investigations into the apparent misuse of contractor propriety data and the alleged bribery of government officials have deeply alarmed the Congress and the public. I can assure you, from first hand observation, that the Department of Defense is equally concerned and has strongly supported the thorough investigations of the Department of Justice, the Naval Investigative Service, and my office. Like you, I await the conclusion of the investigations and of the grand jury proceedings so that the full facts surrounding these cases can become public knowledge.

In the meantime, the Secretary of Defense has moved decisively with a series of actions to safeguard DoD from further criminal activity. The other DoD officials who are testifying here today will elaborate on the rationale for each of those actions; however, your invitation to me included a request that I also comment on certain of those measures.

At the outset, I want to make it clear that Secretary Carlucci has ensured my full awareness of the alternative actions being considered in response to the disclosures. In my statutory role as his chief advisor on fraud matters, I have met with him frequently--initially on almost a daily basis--to discuss the progress of the investigations and what information was becoming available on their results. The heads of the special task force which he established to formulate corrective actions--Dr. Costello and Ms. Buck--also attended. I have been able to offer my insights, based on my experience as the IG at three Federal agencies, as the decision making process progressed. Given the facts available to the DoD and to me when each of the corrective measures were decided upon, I had no objection to them or to the recent adjustments. I continue to support the Secretary's actions as reasonable interim measures.

Clearly, both the Executive Branch and the Congress will wish to explore issues resulting from the investigations in great depth. It will be some months before enough information is on hand to do that in a definitive way. Several of the issue areas are both complex and controversial and will not lend themselves to quick resolution.

I applaud the Subcommittee's initiative earlier this year to foster a productive dialogue between industry, the DoD and Congress regarding a wide range of acquisition issues. Without doubt, the Government cannot unilaterally solve problems such as the misuse of competitors' propriety data and conflicts of interest among consultants. As the initial disclosures occurred it was necessary for the DoD to act immediately. While detailed discussions with industry were impractical at that point, I believe it is now incumbent upon both the Government and industry to work together toward effective longterm solutions.

DOD ABILITY TO PROTECT ITSELF

Some critics have alleged that the DoD is incapable of fighting procurement fraud and waste successfully. Reasons given range from a perceived lack of "independence" for the DoD acquisition personnel or for my office to an alleged inability to take action against major weapons suppliers. I disagree completely. The "independence" issues are totally groundless. I am not impeded in any way by the Secretary of Defense in the performance of my duties. The record of the IG, DoD, over the past six years speaks for itself in terms of illustrating our objectivity and aggressiveness. Similarly, I see no need for more "independence" for acquisition officials, except perhaps that the DoD could do more to protect contracting officers from undue pressures from program offices.

Because certain contractors have such a dominant position in their particular market; indeed, because they may be the only available domestic source for specific defense technologies, they may appear to have immunity from punishment for wrongdoing. I disagree.

There are numerous actions which the Government can take in response to fraud, irrespective of the importance of the accused contractor in building a strong national defense. We can and do take a full range of administrative, contractual, criminal, and civil actions against suppliers who cheat, including suspension and debarment. Suspension and debarment actions can be "surgical," affecting only specific plants, divisions, or personnel of the company.

Historically, the problem has been convincing Government contracting personnel with the responsibility to initiate those actions that such flexibility exists and is appropriate. However, with continued emphasis by my office on running an effective remedies program in the DoD, we are taking aggressive, successful action against a number of "critical" DoD contractors, many of whom are on the "Top 100" list of contractors.

CONSULTANT SERVICES

I would like to turn now to some of the specific problems confronting the DoD acquisition process, starting with the use of consultants.

The Deputy Inspector General testified on the use of contracted advisory and assistance services (CAAS) within the DoD in July 1988 before Senator Pryor's Subcommittee on Federal Services, Post Office and Civil Service. That hearing was useful in clarifying several issues related to the various types of consultants employed either by the Government or by industry. Those issues involve:

-- defining who and what "consultants" are;

-- misreporting of amounts spent for consultants to the Congress;

-- the use of contract consultants to perform personal services as mere substitutes for Government employees performing governmental functions;

-- the black market for contractor proprietary data, in which certain consultants appear to be active;

-- frequent lack of competition in awarding both basic and followon consulting contracts;

-- Government reimbursement of contractors for questionable consultant expenses; and

-- the lack of controls over consultants, including means of identifying conflicts of interest.

Mr. Chairman, the fact that certain individuals may have resorted to illegal behavior, including bribery of Government officials, is not grounds for smearing either the entire CAAS activity or the Government acquisition workforce. Nevertheless, the Ill Wind revelations have focused renewed attention on the issues listed above--most of which are far from new. Some of them, such as the reporting problem, should not be terribly hard to deal with, but in the past there has not been the will to do so. In the first of what will be a series of three reports by the Audit Committee of the President's Council on Integrity and Efficiency, other participating inspectors general and I recommend that the Office of Management and Budget take the following actions:

-- improve the tracking and reporting of costs by using an accounting system set up with CAAS codes;

-- develop definitions for Federal Procurement Data System supply codes, and link appropriate codes to OMB Circular A-120 CAAS definitions; and

-- establish a uniform training course and guide for all agencies to follow.

To address other aspects of the problem, we recommend that OMB:

-- initiate a management oversight program within agencies to ensure compliance with agency and OMB directives on CAAS;

-- develop and implement procedures to ensure that CAAS contracts are necessary and that in-house capability is not available; and

-- remind program offices and contracting personnel of the need for competitive purchase of CAAS support.

The next two stages of the PCIE review will comply with U.S.C. Title 31 on a government-wide basis and will cover the management of CAAS, respectively.

The DoD also needs to tighten enforcement of the revolving door legislation. The General Accounting Office and my office have reported generally poor compliance in the past with post-government employment disclosure requirements and with DoD enforcement. We believe that the conflict of interest legislation over the past few years has moved in the right direction; however, our recent followup efforts indicate that the DoD still has not fully implemented its new standards of conduct regulations. One of the DoD actions being taken as a result of Ill Wind is, in fact, a review of what more needs to be done in that area, and the GAO has already started a followon audit on post-employment disclosure.

I support the general concept that consultants should have to disclose other clients before performing DoD work.

Regardless of whether the Government can get control over its own use of CAAS, the problems related to consultants hired by industry still remain. The first step--one which I recommended to Secretary Carlucci--is the ongoing special audit by the Defense Contract Audit Agency of consultant costs being charged to DoD contracts at a representative number of large contractors. The DCAA has selected 12 corporations with 60 divisions for review, and intends to provide a summary report to the Under Secretary of Defense for Acquisition by the end of October 1988.

The Government currently has no conflict of interest disclosure requirements for individuals or firms hired by other contractors as, say marketing consultants. To the best of my knowledge, neither does industry. It may be that the control of consultants hired in the private sector could be accomplished best through a combination of corporate internal controls (audits, disclosure rules, etc.,) in coordination with or supplemented by selective Government oversight. A sustained, serious, industry-wide commitment would be needed, however. One way to create an incentive--albeit negative--for such a commitment would be to expand the Competitive Information Certificate to all prime contractors. No in-depth studies of such alternatives have been done as yet. Until there has been such a review, I do not think it would be appropriate to attempt to spell out the pros and cons of such potential actions.

OTHER PROBLEM AREAS

All of us are deeply offended by such crass crimes as bribery of public officials, and surely more needs to be done to control the use of consultants by both the Government and industry, especially when personal or marketing services are involved. Hopefully the lessons learned from the Ill Wind revelations will ultimately result in constructive, lasting management improvements. I hope that the Ill Wind cases do not distract the DoD and the Congress from the wide spectrum of other DoD acquisition issues confronting us. The activities disclosed by Ill Wind--as distasteful as they are--need to be kept in perspective. The DoD has never been more effective than it is today in detecting and aggressively investigating procurement fraud. Fears that the DoD is an easy mark for criminals is simply not true--ironically, Ill Wind proves exactly that. Although some of the alleged wrongdoers were high ranking officials, who would be able to use their positions to circumvent many internal controls, they were found out. The catalyst in one key portion of the case was an ex-DoD employee who was given a fraud awareness briefing. Such training is, in fact, one of the many tools brought into much wider use by DoD in recent years to combat fraud and waste.

I doubt that any serious observer believes there are more than a handful of criminally inclined individuals in the tens of thousands of DoD acquisition personnel. That there are any is, of course, intolerable and we will spare no effort to expose them. Nevertheless, the chief causes of waste in the acquisition process are human error and indifference, not crime.

QUALITY OF ACQUISITION WORKFORCE

The basic causes for error are inadequate training, excessive turnover, poor morale, and the increasing difficulty in attracting top quality people to public service. I commend you, Mr. Chairman, for your Bill--S.2530, the Federal Personnel Improvements Act--to help Federal managers to cope with these problems. I support that Bill and the various measures aleady being taken by DoD to improve the professionalism and effectiveness of procurement personnel. I would like to see even more done along the lines of providing additional waiver authority to allow DoD to hire military retires without penalty. It is penny wise and pound foolish to lose many very skilled people, who are often virtually impossible to replace quickly with equally skilled personnel and who are frequently hired back under contract at much greater cost.

As Mr. Vander Schaaf testified before this Subcommittee last spring, we do not see tough revolving door legislation as a real cause of problems in recruiting top quality officials. With the proper degree of personal awareness, Government officials can function effectively while carefully recusing themselves from matters where conflict of interest considerations could arise. Most Government officials do not deal with more than a few companies on substantive contracting matters.

CONTRACTOR OVERSIGHT

Unresolved issues still remain with respect to how the Government can protect itself in the acquisition process.

Needless duplication and resulting inefficiency in the oversight of contractors by the DoD is one of those fundamental problems. My office pointed out the issue to the Packard Commission in early 1985. Contractors and the Commission's own review team provided additional examples, and the Commission recommended a drastic streamlining effort. The DoD established a task force to develop specific recommendations concerning 13 areas where apparent duplication exists. My office has a representative on the task force and we have strongly supported its goals. To be perfectly candid, however, there has been virtually no further progress since Mr. Vander Schaaf described the task force's very limited accomplishments to you last spring. That is very disappointing and I am pessimistic about how much progress the DoD will be able to report to the Congress by December 1988, when such a report is required by law.

Industry tends to call all DoD reviewers "auditors." However, the duplication problem appears to arise chiefly from non-audit organizations. In fact, the DCAA is actually underresourced to carry out several key aspects of its mission, even though the agency's strength grew substantially in the mid-1980's. Reductions were made to DCAA in FY 1988 and the Agency could lose another 900 workyears in FY 1989. I oppose further reductions of DCAA--whether they be arbitrary cuts made just because DCAA is a defense agency or cuts made to reduce the contract audit effort intentionally. Further cuts would seriously impair our ability to guard against overcharging and waste. It is vitally important that we maintain a strong contract audit effort. At the present time, there is already a $150 billion backlog of unaudited incurred costs, and it is growing. Similarly, the DCAA is hard pressed to maintain a sufficient defective pricing audit effort, and currently audits no more than 3 percent of DoD contracts to which the Truth in Negotiations Act applies. We recently calculated that the Government recovers $19 for every dollar spent on defective pricing audits. It is interesting to note that the return for every audit dollar spent detecting defective pricing remained relatively constant at 19:1 between FY 1983 and FY 1988, even when we more than doubled the audit time devoted to this area. That rate of payoff clearly indicates the merit of a vigorous audit effort against defective pricing.

Since 1982, DCAA reports have resulted in savings or cost avoidance of $44 billion and benefited every DoD procurement program. Recognizing that it would be hard to finance all of the additional audit positions needed to accomplish the mission--even if there were some offsetting reduction based on the duplication of oversight review--we welcome the interest expressed by some segments of the defense industry in contractor self-governance. We would view the development of strong, effective internal controls by contractors as a tremendous benefit to both government and industry. Government would not have to try to prevent or detect every problem through direct oversight and could concentrate our scarce oversight resources where they were most needed. Industry could improve its public image, prevent problems which affect its overall operations as well as its government contracts, and could enjoy less direct government oversight in those areas where good controls have been demonstrated. The word "demonstrated" is crucial--we need enough access to contractor internal control systems and records to meet professional auditing standards before classifying internal management systems as effective.

I am pleased to report that the Contractor Risk Assessment Guide, which incorporates these concepts, has been finalized through a joint DoD/industry effort. The Guide will be forwarded to the Secretary of Defense for formal initiation of the program within the next few days.

Before leaving the topic of contractor self-governance, I would like to say a few words about the Voluntary Disclosure Program, which may not be fully understood by the Congress and the public.

I want to make it clear that this is no amnesty program, and never has been represented as such. The purpose of the DoD Voluntary Disclosure Program is to afford contractors the means to report wrongdoing identified through self policing activities. The Voluntary Disclosure Program provides a framework for the Government's evaluation of criminal, civil, and administrative actions appropriate to the situation. In return for disclosing potential fraud and fully cooperating in any Government audit and investigation of the matter, the Government generally allows the contractor the opportunity to conduct an internal investigation which we will then attempt to verify in an expeditious manner, although we reserve the right to commence our investigation at any time. The DoD further agrees generally not to initiate administrative actions until the verification process is completed.

Coordination of information is essential to the expeditious and effective resolution of the matter. By keeping all responsible Government parties informed as to the status of the matter, problems identified may be more quickly resolved. Government representatives are thus better equipped to determine what, if any, criminal, civil, and administrative remedies are appropriate.

Our policies in implementing this program have been described in letters from the Deputy Secretary of Defense directly to defense contractors. The Assistant Inspector General for Criminal Investigations Policy and Oversight is the designated point of contact for voluntary disclosures of potential criminal or civil fraud issues. Matters not involving fraud are to be presented to the appropriate contracting officer or DCAA auditor.

As of August 31, 1988, 109 matters have been disclosed to my office and accepted, at least preliminarily, into the program. Total funds recovered to date are over $53 million.

DOD NOT USING EXISTING AUTHORITY

Mr. Chairman, another broad theme I want to address is that, by and large, the DoD already has ample authority to address nearly all of the most persistent acquisition problems. There are several areas in which I do not think the Department has used its existing authority aggressively enough.

In some cases, organizational or procedural obstacles are allowed to exist even though they limit the effective use of authority by senior officials.

I have mentioned a couple examples such as the failure to enforce existing post-employment disclosure requirements. I want to give you some others.

DEFENSE ACQUISITION REGULATION CHANGES

The Defense Acquisition Regulation Supplement (DFARS), which implements the Federal Acquisition Regulation (FAR), is the pivotal document for acquisition policy and guidance in the DoD. Changes are controlled by the DAR Council, in which each major procurement component is represented. The strengths of the arrangement, historically, have been that individuals assigned to the Council have been extremely knowledgeable and that the system allows all views to be aired. The weaknesses are that the Council can be interminably slow to act and that it is allowed to thwart top DoD management initiatives. A few specific examples illustrate the point:

- Suspension and Debarment Procedures for Subcontractors. My office has been pressing since 1984 for actions to close various loopholes in the suspension and debarment process, which is one of the primary tools for protecting the Government's interests. In May 1986, the Assistant Secretary of Defense (Acquisition and Logistics) advised the Secretary of Defense that action would be taken to deal with various problems, including the fact that subcontracting opportunities remain open for suspended or debarred contractors. In 1987, the GAO reported that this loophole had not yet been closed, and the DoD responded that it would be. In March 1988, the DAR Council adopted language to deal with various other suspension and debarment concerns, but declined to extend suspension and debarment regulations to subcontractors. The Under Secretary of Defense for Acquisition supported the Council. I advised the Under Secretary that I strongly disagreed with the reversal of the DoD position, and we have been trying to work out mutually acceptable language. The matter remains unresolved.

- Inappropriate Cost or Pricing Data Exemptions. Contractors may obtain exemptions from the requirement to submit certified cost or pricing data if their proposed prices are based on established catalog or market prices of commercial items sold in substantial quantities sold to the general public. Our 1987 audit (Report No. 87-210, "Catalog and Market Priced Contracts") found that one out of every three exemptions approved did not meet commerciality criteria on the basis of sales data submitted. Contracting officers routinely accepted contractor claims for exemption from submitting cost or pricing data without adequate verification of the reported commercial sales data and catalog and market prices. Furthermore, once the commerciality exemption was granted, the FAR did not provide the contracting officers with remedies to adjust prices and recoup the amount of any resultant overpricing.

We recommended a revision to the acquisition regulations to require verification of contractor catalog pricing exemption claims for contracts exceeding $1 million. We also recommended revisions to permit contract price adjustments when a contractor's representation of commerciality is invalid.

Although the Assistant Secretary of Defense (Acquistion and Logistics) agreed with our recommendations on January 14, 1987, the revisions have not been made by the DAR Council.

o Work Measurement. In 1986 my office conducted one of the more comprehensive studies ever done on the use of work measurement standards and engineered labor hours in the defense industry. We concluded that there is vast potential for improving productivity and efficiency in contractor operations through more vigorous application of these modern management tools. Expanded use of work measurement holds exciting possibilities for driving down overall costs--a far more significant target than is mere profit control, which unfortunately has tended to attract the most attention in the Congress and GAO. The final report recommended that DoD establish a policy requiring work measurement systems based on engineered labor standards for certain prime and subcontracts. The recomendations contained specific contracting officer and contractor responsibilities, accuracy criteria for the engineered labor standards, and requirements for revisions to MIL-STD-1567A and specialized training programs.

In May 1987, Secretary Weinberger advised Senator Grassley that "most if not all" of our recommendations would be adopted. In November 1987, the GAO issued a report endorsing our conclusions and recommendations. The DoD again responded that implementing DAR Council action was under way. Unfortunately, proposed DFARS language was not published until August 1988, and we find the proposed language to be seriously inadequate and not in accordance with the previous DoD commitments on the subject.

- Pension and Insurance Reviews. Contractor pension and insurance systems comprise one area in which Government oversight is duplicative and therefore inefficient. The GAO noted a lack of coordination among insurance DoD review specialists and auditors during a 1983 review. As a result, a DAR Council case was initiated in March 1984 to change the regulations to prescribe better coordination. The case remains incomplete and the lack of coordination persists.

At times the problem is at least partially at the Government-wide level, not solely within the DAR Council. Examples are as follows:

- Estimating Systems. In May 1986 my office recommended a number of changes in the regulations to address the longstanding problem of inadequate contractor cost estimating systems. The GAO and senior DoD managers supported those recommendations. Nevertheless, it still took two years for the DAR Council to issue revised DFARS coverage. Unfortunately, the Office of Federal Procurement

Policy then declared an important portion of the new guidance--a description of what constitutes an adequate estimating system--to be excessively prescriptive and not in accordance with the Paperwork Reduction Act. The OFPP made this decision without contacting my office and in spite of the fact that there were no objections raised when the cost estimating system guidelines were published in the Federal Register. I strongly support the recent appeal by the DoD to OMB on the matter.

o Tax Information Returns. In 1986 my office and the President's Council on Integrity and Efficiency pointed out widespread Executive Agency noncompliance with Internal Revenue Code requirements for filing Forms 1099, Information Returns, to report certain nonwage payments made to individuals, partnerships and medical corporations. A major factor contributing to the noncompliance was an inability to identify recipients of the payments that qualify for 1099 reporting. Failure to file Forms 1099 increases risks that taxpayers will not report such taxable income. Studies by the IRS have shown that taxpayers report about 97.4 percent of income when Forms 1099 are issued, compared to about 83.2 percent when they are not. Based on IRS projections, the proper filing of Forms 1099 by Executive Agencies could result in additional tax revenues of $500 to $600 million. The reports recommended that the Federal Acquisition Regulation be revised to permit the collection of data--Taxpayer Identification Numbers and legal taxpayer status of contractors/venders receiving reportable payments--essential for proper filing of Forms 1099.

Although the FAR revision was initiated in 1985, it is still not complete. For the past several months, further delays in completing the revision have been caused by legal concerns over the application of the Privacy Act to the collection of Taxpayer Identification Numbers. The DoD and other Federal agencies will continue to be in noncompliance until the issue is resolved.

We have urged DoD acquisition officials to issue interim guidelines for DoD implementation--albeit without success. Most recently, the DoD Comptroller has prepared a request to OMB for intervention to get the FAR change issued by the Civilian Agency Acquisition Council. This would be the preferred solution because of the Government-wide applicability of the FAR. If that approach does not bring prompt results, however, unilateral action by the DoD FAR Council should be pursued through an appropriate change to the DoD Federal Acquisition Regulation Supplement.

WEAPONS SYSTEM ACQUISITION DECISIONS

I believe that the Under Secretary of Defense for Acquisition and the Defense Acquisition Board have sufficient authority to manage the major weapons system acquisition process in a rigorous, effective manner. Although improvements have been made, our reviews indicate that certain problems persist. A summary report (No. 87-193) on the "Audit of the Effectiveness of the Defense Systems Acquisition Review Council (DSARC) Process" was issued on July 17, 1987 to recap three previous audits covering 29 systems. Our current audit of the Defense Acquisition Board process has resulted in one final report and two draft reports thus far. We are finding a continued need for more rigorous enforcement of existing acquisition policy and better implementation of the specific audit recommendations made previously to improve the effectiveness of the decisionmaking process.

Previous audit recommendations which have not been effectively implemented for all systems include the following:

-- Enforce the DoD 5000 series instructions for timely submission of complete and accurate documentation to the Defense Acquisition Board.

-- Ensure that the Services are adequately funding approved programs.

-- Require the Services to implement DoD Directive 5000.1 and DoD Instruction 5000.2 for fully documenting the Justification for Major System New Start.

-- Clearly distinguish between operation and technical thresholds.

-- Clarify the types of Milestone II documentation required for operational characteristics to facilitate the assessment of operational testing results.

-- Develop examples of required operational performance thresholds for milestone decisions.

-- Ensure the Development Concept Paper is complete, to include operational performance measures as well as technical performance measures, and is updated.

-- Ensure that Test and Evaluation Master Plans are complete, and prescribe specific operational test requirements.

Recently there is also an indication that the Services are attempting to circumvent the intent of the regulations in trying to represent a production decision as being for low rate, when in reality, it is a full rate production decision--one that requires substantially more documentation and testing than is being provided.

AMRAAM

I understand that Committee Staff have taken particular note of our final audit report on the Advanced Medium Range Air-to-Air Missile (AMRAAM) Program. In that report, we observed that the Air Force scheduled an AMRAAM Program Review to ask for Defense Acquisition Board approval to procure long leadtime items valued at $400 million for the first lot of full-rate production (Lot III is 1,270 missiles, estimated to cost $835 million). We believe that approval of this procurement would, in effect, authorize full-rate production since it represents about 50 percent of the estimated cost of Lot III.

The Defense Acquisition Board will not have the test and cost data required to assess system readiness for full-rate production. Operational testing is far from complete and an independent cost estimate has not been prepared. Operational tests were conducted on missiles that were not productive-representative, since they were not built using production line techniques. Those results are not legally sufficient to support a full-rate production decision. We believe the Air Force should limit acquisition of long leadtime items until they demonstrate favorable operational performance and provide an independent cost estimate.

We recommended that the Under Secretary of Defense for Acquisition withhold full-rate production approval until the Air

Force provides favorable operational test results and an independent cost estimate. The Under Secretary nonconcurred, saying that Lot III was already, in effect, a low-rate production lot because it had been reduced from 2,000 missiles in 1985 to 1,270 missiles in 1988. We replied that the Director, Operational Test and Evaluation, who determines what is low-rate versus full-rate production, has determined that Lot III is the beginning of full rate production.

It is our understanding that the Department will adopt our recommendation and will so inform the appropriate Congressional Committees.

COMPONENT BREAKOUT

I believe that better definition is needed in the DFARS of when an analysis of system component breakout for competition is appropriate and what the parameters of such analysis should be. In reviewing 21 audit and 4 survey reports issued by my office on major acquisition programs within the past two years, it is significant that inadequate component breakout analysis is the most frequent finding (11 of the 25 reports). I have recommended to the Under Secretary for Acquisition that the need for better policy guidance in this area be addressed. Increasing competition at the system component level can often result in very significant savings.

DEFECTIVE PRICING

The last pervasive system deficiency I want to address is the inability or unwillingness of the DoD to use the protections to the Government in the Truth in Negotiations Act to the full extent intended by the Congress. We have testified at length on this subject before various Committees of the Congress, so I will merely note that we believe a series of actions are needed, as follows:

-- The DoD needs to keep pressing contractors to avoid inadvertent defective pricing by improving their cost estimating systems. (I previously addressed the problem with OFPP concerning the new DFARS coverage.)

-- The Under Secretary for Acquisition should advise all DoD contracting officers, through a policy letter, of the variety of actions they can take to reduce the risk of defective pricing. To date, the Under Secretary nonconcurs, on the basis that defective pricing is not a serious problem and enough emphasis has been placed on the matter. I cannot agree. A recent joint audit by my office and DCAA found defective pricing in half of the 774 contracts reviewed. We also have found that training for contracting officers on the subject is still insufficient.

-- Audit coverage should be increased.

-- More emphasis should be placed on resolving and closing overage defective pricing audit reports. As of March 31, 1988, the DoD had 348 unresolved defective pricing audit reports over six months old, involving potential defective pricing of $837 million.

-- Increasingly liberal interpretations of what constitutes "adequate price competition" should be avoided, for they are merely resulting in more and more contracts not being covered by the Truth in Negotiations Act. Recent Navy actions to restrict the contracting officer's ability to get cost and pricing data are especially ill-advised.

I want to expand on the last point. My staff recently completed an audit of 38 dual-source acquisitions that had been exempted from the requirements of the Truth in Negotiations Act based on supposedly adequate price competition. Our review of the 38 acquisitions revealed that adequate price competition did not exist for 30 acquisitions, valued at $8.8 billion. As a result, the contracts were improperly exempted from the provisions of the Truth in Negotiations Act.

We recommend that the Assistant Secretary of Defense (Production and Logistics), instruct the Services to obtain certified cost or pricing data and include the defective pricing recovery clause in all pricing actions where the award may be split between offerors. The Assistant Secretary nonconcurred with the recommendation, stating that the requirement for certified cost or pricing data should be determined on a case-by-case basis. Our report provided convincing evidence that contracting officers had not been able to determine whether adequate price competition exists in dual-sourcing. If determinations continue to be made on a case-by-case basis, contracting officers will continue to accept contractor prices as fair and reasonable without sufficient insight into the basis of the proposed prices, and the Government will not be able to recover any overpricing reported later as the result of postaward audits of dual-sourced contracts. We are using the DoD audit resolution process to pursue our disputed recommendations.

SUMMARY

Mr. Chairman, I have attempted to cover a lot of ground in this statement in order to respond to the issues raised in your invitation letter. I want to emphasize that my staff and I are available to help the Congress further explore each of these issues, in any way possible.

That concludes my statement.

Senator BINGAMAN. Thank you very much for your statement. Mr. Vander Schaaf, do you wish to make a statement?

Mr. VANDER SCHAAF. No, I do not, Senator. I will respond to your questions.

Senator BINGAMAN. I will ask several. Let me first say that your assessment has been particularly useful and on the issue of the number of audit personnel, I am pleased to announce that the conferees on the Defense authorization bill have included a specific provision, reversing the cuts that were made in the audit and support personnel for the Inspector General's office and the Defense contract audit agencies, so I think that should help somewhat to alleviate at least one of the problems that you have identified.

You said, early in your testimony, that DOD could do more to protect contracting officers from undue pressure from program offices. I would be interested in your elaborating on that somewhat if you could, either of you, as to the specific concerns that you have there and what you recommend the Department of Defense do.

Mr. VANDER SCHAAF. One of the first problems, the most recent one that has come to our attention, is the undue pressure from time to time on a contracting officer to rush his proceedings to reduce the contract administrative lead time. This is a problem in our business. Sometimes there is no need to rush.

Some of the ways to respond to that push to "reduce lead time" are to avoid seeking audits of the contractor's proposal, eliciting cost or pricing data from the contractor during the proposed period, or obtaining the necessary certification that would trigger the Truth in Negotiations Act.

We think that this is ill-advised. In fact, one of the services, the Navy, has said, "When we have dual source contracts—'split buys' is probably a better term to describe those—the contracting officer shall not obtain cost or pricing data."

We believe that under those circumstances, the Government loses a key control and a safeguard that it has in its pocket to use. If the information provided to the contracting officer was inaccurate and not audited, the contracting officer does not know if he is getting a fair and reasonable price.

One of the excuses is, "Well, if the price we pay for this contract is comparable to what we paid last time, it must be fair and reasonable." I think our spare parts efforts of 4 or 5 years ago determined that looking at what we paid for something over a period of time is not necessarily an indicator of a fair and reasonable price.

Senator **Bingaman**. This Navy policy that you allude to, is this a recent decision?

Mr. **Vander Schaaf**. Relatively recent. It has been the policy for a little more than a year, and it has been applied very strongly to dual source or split buy contracts.

We looked at 38 dual source contracts and concluded that 30 of those 38 were not competitive. They were all listed as competitive even though cost or pricing data was not sought in those 30 contracts. They totaled $8.8 billion.

The Government is put at risk, in terms of looking at the underlying pricing and costing that supports that contract, when we do not audit or do not obtain the cost or pricing data in those circumstances.

Senator **Bingaman**. Now as I understand it, you are suggesting or you are recommending and you have recommended to the Secretary of Defense through the Under Secretary that the Department of Defense override the Navy on this and insist that that information be obtained.

Mr. **Vander Schaaf**. Yes, that is the action we have strongly recommended. The process is now going through what we call audit resolution. Eventually that issue, if it is not resolved with the Assistant Secretary for Production and Logistics or with the Under Secretary for Acquisition, would be elevated to the Deputy Secretary of Defense level.

Senator **Bingaman**. This policy of the Navy has been in effect for a year, how long does it take before your suggestion or your recommendation is passed upon at a high level? It seems to me that if we just let month after month after month go on here without taking corrective action, it is costing a lot of money.

Mr. **Vander Schaaf**. It could. The time to implement a change in the process or the regulation or policy varies greatly.

Ms. Brown's statement contains some examples of where we thought the regulation writers, the Defense Acquisition Review Council, have simply been negligent in issuing timely regulations on some of the recommendations that we have made.

Some of those recommendations have been controversial; we have argued for those recommendations up the chain of command in the Department. We have received a resolution from the Secretary of Defense on some of those; but, to this day, some have not been implemented. There are a number of examples in our statement.

Senator **Bingaman**. Let me just cite one of the main problems that those of us in Congress have on this area. A major theme of your testimony here is that you feel the Department of Defense has adequate authority to deal with the procurement problems that have surfaced.

I do not necessarily disagree, but in the issue we were just discussing, evidently efforts to deal with these problems within the Department of Defense by regulation have not succeeded and have not been pursued aggressively. They have been pursued aggressively by you but they have not been picked up and action has not been taken in response.

So the pressure is on the Congress to go ahead and legislate a matter that perhaps should have been done by regulation. Is this an area where you think Congress needs to look at legislating a mandate that overrides the Navy's position?

Ms. BROWN. I think it would be difficult to legislate these individual changes. Some of them certainly could be, but the longer term solution is to get a DAR Council that does react in a quicker manner. Once a resolution has been achieved at the departmental level, there is no excuse for something languishing for more than a year in the DAR Council.

Senator BINGAMAN. OK. My time is expired here. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. I made reference to the POM's and the PED's, certain data that it is apparently unclear as to whether or not contractors ought to have. Do you know whether or not contractors are supposed to have that data, that planning and budget data of the Department of Defense?

Ms. BROWN. Contractors should not have that data. I do not think we even provide it to Congress, so certainly contractors should not have it available to them.

Senator LEVIN. Do you know whether or not in fact it is readily available and lots of contractors in fact do have it?

Ms. BROWN. There have been some cases in which we found that contractors were able to get it at certain points. There is an active case now that is still pending resolution in the courts, so I cannot give you detail on that. But there have been opportunities for contractors to pick up that data.

Senator LEVIN. Do you know whether or not many contractors feel that it is perfectly legal and proper for them to have that data?

Ms. BROWN. I am sure some of them do, especially where they have been able to pick it up freely, why certainly they would feel that they have it with Defense approval.

Senator LEVIN. Do you believe the regulations are clear on that issue?

Ms. BROWN. I thought they were, but if the problems still exist, then we need clarification.

Senator LEVIN. Let me, without quoting the name of the contractor, quote a legitimate contractor who told us, "You are not worth anything if you do not have the POM."

Mr. VANDER SCHAAF. Senator, in the case of the Defense Program: the FYDP, for example, the Department's policy is that it is a planning document that has not even been available to the General Accounting Office, and is not regularly given to congressional committees.

The PED's, the details on a program for the particular year under which the Congress is examining the budget is provided, but the historical costing-out in the out years is not necessarily provided.

Senator LEVIN. Is that the POM?

Mr. **Vander Schaaf**. Yes, sir, that is the POM. The Five Year Defense Program. Under those circumstances, you cannot have it both ways.

Senator **Levin**. Who cannot?

Mr. **Vander Schaaf**. The Department of Defense cannot, in my opinion. Basically we have said that that material is not available.

Senator **Levin**. How is the Department of Defense having it both ways. I am not sure what you are trying to say.

Mr. **Vander Schaaf**. Well, I have had discussions with individuals, not recently but several years ago. At that time, we had a number of cases under review involving this problem—a number of criminal cases. People in the Department argued that that material should be available to the contractors so they would know where we are going, so they can do better planning, better research, et cetera. The fact that they have it ought not be illegal.

This relates to the GTE case, for example, which was one of the cases back in the early 1980s that involved this kind of problem.

You see the difficulty we have when we do not want to provide planning data to other oversight organizations, then you can't say it is all right to give it to individual contractors.

Senator **Levin**. Given that ambiguity, that division of thinking, that schizophrenia on this subject, however you want to describe it, inside the Department of Defense, does it surprise you that there is a lot of uncertainty about that issue in the contracting community?

Mr. **Vander Schaaf**. No. Absolutely not. It does not surprise me at all.

Senator **Levin**. Looking at your testimony, Ms. Brown, on page—I guess it is not numbered—but anyway, you talk about contractor oversight, about 10 pages into your testimony I think, the section entitled "Contractor Oversight?"

Senator **Bingaman**. It is page 12.

Senator **Levin**. And you have made reference to those comments in this testimony as well. To be perfectly candid, there has been virtually no further progress since Mr. Vander Schaaf described the task force's very limited accomplishments to you last spring. This is very disappointing, and I am pessimistic about how much progress the DOD will be able to report to the Congress by December 1988 when such report is required by law.

Have you told the task force and the Secretary of your concern?

Ms. **Brown**. We have communicated with them quite regularly on this subject. "Ill wind" has taxed that same group of people to very heavy degrees, in preparing testimony and, preparing the alternatives that Mrs. Spector described earlier. There are a limited number of people, and they have almost had to withdraw from continuing this part of the review.

We have continued our efforts. So have some others. On September 15 there was a meeting with the Air Force to look at oversight by their core groups. We are still hoping for progress, but I do not think they are going to be able to meet that deadline.

Senator **Levin**. And then you have indicated a whole lot of areas where the DOD is not using existing authority aggressively enough, and the first one is defense acquisition regulation changes and inside of that is a subject suspension and debarment procedures for subcontractors. In this situation, and I now do see a page number on here—I have got page 18 if it is the same version—in May 1988 the Assistant Secretary of Defense advised the Secretary of Defense that action would be taken relative to subcontracting opportunities that remained open for suspended or debarred contractors.

Then in 1987 the GAO, you tell us, reported that this loophole had not been closed, and the DOD responded it would be. Now, they are saying it is not going to be. So, there is an instance when they told us that something would be done and are now telling us it will not be done.

Page 19, the same point you make relative to inappropriate cost or pricing data exemptions. The Assistant Secretary of Defense agreed something would be done in January 1987. It has not been done.

Relative to work measurements standards we were told by Secretary Weinberger on page 20 that most, if not all the recommendations, would be adopted. Now, you are telling us at the bottom of that page that is, in fact, seriously inadequate, and it is not in accordance with previous DOD commitments on the subject. It is just one after another.

Ms. BROWN. Yes.

Senator LEVIN. Is this troubling you enough so that you have taken this up with the Secretary?

Ms. BROWN. I have taken it up with the Under Secretary for Acquisition and pointed out these areas.

The task force formed as a result of "Ill Wind" is looking at specific areas which need improvement. I have passed on at least a couple of these issues to them, that we have seen as loopholes that continue to exist and create such problems. They have revised several of these and are now looking at others.

I have not seen definitive action yet, but I hope that, after the latest meeting that I had with them, we would see some change occur.

Senator LEVIN. I am deeply troubled by the testimony. I must say that there are just a number of items. I just picked a few that the DOD has not done what it committed itself to do or what we by law or regulation expected it to do. It is very troubling to me. Thank you. Thank you, Mr. Chairman.

Senator BINGAMAN. Following on that same line of questions, the DAR council seems to be where the responsibility lies for moving forward in each of these areas or most of these areas that you have indentified, as I understand it.

Who is responsible for lack of action by the DAR Council or who is accountable for moving the DAR Council forward on its responsibilities?

Ms. BROWN. The DAR Council is under the Under Secretary for Acquisition. Now, do you want me to comment further on that?

Mr. VANDER SCHAAF. Mrs. Spector, who previously testified, plays a strong role in their direction also. I think the council may report directly to her, but I am not quite 100 percent sure about it. It may be reporting to the Assistant Secretary for Procurement and Logistics, who then in turn reports to Dr. Costello.

Senator BINGAMAN. How much of the problem here is a result of the fact that many of the people are preoccupied with responding to this "Ill Wind" activity and how much of it is more endemic or chronic? I gather some of what Mr. Vander Schaaf said was that there is a many year-long delay in getting reaction. We have not even known about this for more than 4 or 5 months, this "Ill Wind."

Ms. **Brown**. That is right. I think we can safely say that in the last 4 or 5 months, at least at the Assistant Secretary level, they have been immersed in actions resulting from "Ill Wind."

The DAR Council itself, however, continues its activity. I do not think they have been directly affected. The problems we are talking about go back to a 3-year period or perhaps even more. So, although I can understand why the duplicative oversight review has been delayed, I do not think the concern we have about the actions taken by the DAR Council can be attributed to "Ill Wind."

Mr. **Vander Schaaf**. Mr. Chairman, maybe I can take you back through just one issue that really bothers us, the suspension and debarment of subcontractors.

We did a review, soon after the IG office was created in 1983, on suspension and debarment. It was a very effective review and had a lot of impact. The numbers of suspensions and debarments in the Department went from under 100, maybe 50 to 80 a year, to over 800 a year in recent years.

However, we pointed out a serious loophole in the process. When a contractor gets suspended or debarred, it still can do business as a subcontractor as opposed to having a direct contract with the Department of Defense.

Interestingly enough, this became an issue when the Wall Street Journal made a big story out of it in May, 1986. I happened to meet with Secretary Weinberger at that point. He said, "We have got to fix this. Let us fix it."

There were some congressional hearings about eliminating the loophole and making suspension and debarment apply to subcontractors as well. In fact, Senator Roth held those hearings in the Governmental Affairs Committee, and there were some others. GAO reported that we ought to do it and the Department answered the GAO report and said, "Yes, we are going to do it."

I have a series of tabs in my backup book that has the correspondence on this matter. We are still bickering about this problem. What we want is not an absolute ban on a suspended or debarred contractor from being a subcontractor. What we want is some high level review of that process before it happens. We do not want prime contractors to automatically be able to pick up a suspended or debarred company and use that company to supply the Department of Defense.

We think our suspension and department rules will be able to greatly reduce the impact of this problem. Many of these suspended and debarred suppliers have been convicted of providing us with junk products that do not conform to the specifications.

We certainly do not want those kind of people supplying that kind of product on a subcontract basis. At least we want to know what is going on out there. To this date we have not been able to make that happen.

Senator **Bingaman**. Well, we will contact and write to Mr. Costello and urge him to take some action on this as quickly as possible. I can understand your frustration about a matter which you called to the attention of the Department and DAR Council—was it in 1984 or 1985?

Mr. VANDER SCHAAF. The DAR Council worked on it in the 1986–1987 time period. It put out a new regulation on suspension and debarment, and took the key clause on suspension applying to subcontracts out of the proposed DAR case that has been presented to the council. We found this to be very upsetting.

Ms. Brown has written back to the Deputy Assistant Secretary of Defense for Procurement again as late as September 7 on this issue. Basically our position is that we recommend FAR language along these lines, that subcontracts with debarred subcontractors should, in most cases, be prohibited.

If a contractor determines that a subcontract with a debarred contractor is required, it should be based on the criteria of a compelling need. That criteria ought to be set forth in the FAR.

What are some of the compelling needs? A contractor's determination of compelling need should be made by the president of the company, or a senior official of the company, that is a prime contractor. They should state, "we, in our company, want to do business with a debarred contractor."

Last, the contractor's determination of compelling needs should be submitted to the Government contracting officer for review prior to awarding the subcontract. With those kinds of safeguards, we do not absolutely prohibit doing business with debarred subcontractors because there may be circumstances where it is essential to the national defense that we do business with those people. But as a rule, we should not. However, we cannot seem to get that point across.

Senator BINGAMAN. Well, to refer to the point I made earlier—if, in fact, these things cannot be done within DOD, then we have to legislate them. I do not know that that is an adequate solution, but it is certainly better than just letting the thing float.

Would you have a reaction to that, if something like this has not been dealt with by the time the Congress reconvenes, is it something that we ought to consider putting under the Defense authorization bill this next year?

Ms. BROWN. I think that is an alternative. It is unfortunate, if that has to occur, but it certainly is an alternative, if we cannot get action on the part of the DAR Council.

Senator BINGAMAN. You also say in your testimony DOD needs to tighten enforcement of the revolving door legislation. They have not fully implemented its new standards of conduct regulations. Could you elaborate on the extent of the problem we have here?

This is an issue, of course, that Congress went back and forth on, and finally came out with some legislation which is not totally agreed to by everybody as yet, but what is the extent of the problem we need to try to deal with here?

Ms. BROWN. Well, our concern is that we have not yet had cases that have been tested. We have a few cases that we are working on now. As far as penalties are to be applied in this area, we are concerned about the regulations.

The Department of Defense has put our regulations in this area, but the various services have not yet incorporated the DOD regulations into their body of regulations. That is what is used out in the field by the many decentralized organizations. So we have no reason to believe that there is a good understanding of what is required from people when they leave government service, and we are unsure whether there would be compliance, because the information that they are using as a guide does not yet incorporate regulations regarding this new legislation.

Senator **Bingaman**. Now, this is not a problem with DAR. This is something else.

Ms. **Brown**. No. This is another regulatory process.

Senator **Bingaman**. So, the Department of Defense, again the Under Secretary's office should have promulgated clear instructions for all the various services on this?

Ms. **Brown**. This would be in the General Counsel's area, so it would be a separate authority.

Senator **Bingaman**. All right. In reference to defective pricing, you cited us the problems that you had with the Navy's decision or policy decision to not require appropriate information before they enter into contracts.

One of the things that we had asked you about and you responded to in your testimony is the AMRAAM system, and I would be interested if you would elaborate on that a little bit as to what you see in the way that the Department of Defense is proceeding with AMRAAM.

Mr. **Vander Schaaf**. We see the basic problem as one of being positive, or as reasonably positive as we can be that a weapons system will perform and work as advertised and in the way the service that wrote the basic performance requirements for that weapons system, intended. We want it to perform, not only in development tests, but in operational tests as well.

In the AMRAAM's case, some of the operational tests that were required to meet those standards have not been finished, and there is a problem. The Lot III buy is about to be awarded and it is a major lot buy. The Congress has said that you cannot go to full-scale production of this system until it passes operational tests and evaluation.

The issue is that the Department, or primarily the Air Force, is arguing that, "we will continue at low-rate, initial production or we will buy long-lead items." There seems to be some confusion as to what long-lead items are on a missile. They are going to spend half the money, or more precisely they want a release of about half the money on the AMRAAM, Senator, for long-lead items.

It looks to me like that is tantamount to buying all the parts for the missiles. It is really not long-lead items; it is an initial production decision. Our audit staff concluded that, in fact, it was tantamount to making a full production decision.

Fortunately, the Department has put this item on hold for a while. It is taking a further look at it, and I think the outcome in this case, unlike the outcomes in some of the other cases we talked about this morning, is positive. At least in this case, people are taking a second look at it before they make a full commitment.

Senator **Bingaman**. So you feel that no action is required by us on this matter at this time?

Mr. **Vander Schaaf**. No. I think the Congress is well informed on this matter, and I think the Department has acted very responsibly on the matter.

Senator **Bingaman**. In your testimony you make a more general statement, and I think it probably applies to the example you just discussed, but your original statement is the services are attempting to circumvent the intent of the procurement regulations in trying to represent a production decision as being for low-rate when in reality it is a full-rate production decision, one that requires substantially more documentation and testing than has been provided.

Now, the AMRAAM is an example where that was occurring. The case that you cited with the Navy policy, are those the two instances that are of particular concern, or am I mixing some things up?

Mr. **Vander Schaaf**. I think you are mixing some things up. That is a concern, and it may be a concern in other weapons systems as well—this business of requiring operational testing and passing of operational tests along with the certification that comes from the new director of operational testing and evaluation that is necessary to proceed into full rate production.

We have to be ever attuned to that. I think we can watch that, and the General Accounting Office certainly watches it. However, there is a lot of discussion about the issue of whether the General Accounting Office is doing a very good job in this area. I guess the Director for Test and Evaluation is also concerned that our audit staff is not always fully aware of all the issues and does not always do a good job in this area either.

We think we have done a reasonable job, and, in many cases, the Department has responded positively to our efforts there. It is in this regulatory area, which is a different issue, where we think we do not get the kind of response that we need, Senator.

What happens is that the acquisition management folks sometimes do not really like a recommendation from the IG or elsewhere, or even a law that the Congress has passed. It has to be eventually written into a regulation, assuming the Secretary of Defense agrees.

What we go through then is what is so frustrating to us. We always go through the prescribed resolution process within management channels in the Department, as we appropriately should. We lost some of those, and in those cases we walk away and say that is the end of it. But when we win, as we have won in some of the cases that I have talked about, such as suspension and debarment and work measurement, somebody says, "All right, we now have to write a regulation to implement what the IG has recommended. The Secretary has said go do it."

Instead of going ahead and proceeding to write the regulation, they open a "case" and reexamine the issue, which has already been argued up and down the line, all over again. If they start that process again, we are talking 2 or 3 years and nothing happens. That is where we become concerned, and that is why we have listed five or six items in our statement along that line.

Senator **Bingaman**. Senator Gore has some questions.

Senator **Gore**. Thank you very much, Mr. Chairman. I apologize to our witnesses for being late in arriving.

I have been reading the testimony and have had an interest in this whole problem and I think your testimony, Ms. Brown, is exemplary in its candor and for its rightness, but it raises some very serious questions in my mind, and I find the testimony to be stunning, really.

Let me ask you about the statement you make on page 29 of your prepared testimony. Why, in your view, has the Navy restricted contracting officers' ability to get cost and pricing data? I am not clear as to why they would do that?

Ms. **Brown**. I am not positive as to why. I believe we are arguing about definition. We feel a split buy is not competition in the sense that you do not need cost and pricing data. The Navy feels they can loosely define that as competition and speed up the process, perhaps, to get contracts through more quickly.

Mr. **Vander Schaaf**. I think that is the basic reason. They are concerned that they have to speed up the acquisition process and we come back and say, "What is the great need for speed in peacetime?" We understand that there is a need for expediency but let us price it right.

We have recently done some work, Senator, on what they call procurement administrative lead time. The buzz word in the Pentagon is PALT (Procurement Administrative Lead Time). We have BAFOs and we have PALTs and we have other things.

We have looked at contracts of over $10 million and how long it takes to award that contract after the proposal is back into the Government's hands. After the contractor has got the RFP, written the proposal, and given it to the Government, it is about 245 days.

What is interesting is that they think that they can reduce this time greatly by getting the auditors out of the process. We did a review recently and found that while we are not totally finished, auditors are taking 44 of the 245 days to audit the proposal.

Interestingly enough, auditors are only supposed to take 30 days according to the regulations, but they are close, on the average, to what they are supposed to take. It is not a big deal. The most they could save by throwing the audit out is 44 days, on the average, out of the 245 days or so that it takes to administer the award of a typical contract.

Now, I can give you some other things to eliminate in that 245 days, if we need to compress the time, long before I would be willing to take away the ability of the Government to audit a proposal.

Senator **Gore**. You examined 38 dual source acquisitions that had been exempted from the requirements of the Truth in Negotiations Act. Who has the authority to exempt an acquisition from Truth in Negotiations?

Mr. **Vander Schaaf**. They are exempted by definition. The law allows that, in competitive awards, we do not have to use the Truth in Negotiations Act. The difficulty is, when we split an award and one contractor has a clear advantage because it has produced the item historically or when neither contractor can produce the full buy. One contractor knows that it will receive 40 percent of the award.

Senator **Gore**. Well, who exempts them?

Mr. VANDER SCHAAF. The contracting officer can.

Senator GORE. The contracting officer exempts them by declaring that there is adequate price competition?

Mr. VANDER SCHAAF. Exactly.

Senator GORE. Correct?

Ms. BROWN. That is correct.

Senator GORE. Now, the contracting officers in these 38 cases, were they 38 different people?

Mr. VANDER SCHAAF. Yes, sir. There were probably more than that because these 38 cases involved entire programs in which there are a large number of contracts.

Senator GORE. Who would that person typically be—what kind of person?

Ms. BROWN. Probably a GS-12, or GS-13, someone on the mid-level career.

Senator GORE. So, we have 38 acquisitions that you examined carefully and audited—almost $9 billion worth of contracts—and out of the 38 acquisitions, you determined that 30 of them should never have been exempted from the Truth in Negotiations Act?

Mr. VANDER SCHAAF. That is correct.

Ms. BROWN. That is true.

Senator GORE. Why do you think they were exempted when your audit showed that it was improper to exempt them?

Ms. BROWN. Well, they were exempted, prior to the audit.

Senator GORE. I know that. I understand.

Ms. BROWN. It is my opinion that, in an effort to speed up the process, they are trying to define as many things as possible as competitive, and to use them as statistics to show that we have this many competitive contracts in the Department of Defense. But when you take a 60/40 split, both contractors essentially have a full contract. In their opinion, they know they are going to get a certain amount of the business. In such cases, you do not have, in the auditors' opinion, adequate competition to assure the Government is getting a good buy. We want the cost and pricing data and do not feel they should be included as competitive contracts.

Senator GORE. Well, in many cases, these are dual source acquisitions that we are talking about here.

Ms. BROWN. Yes.

Senator GORE. In most cases that is not really in competition anyway, is it? It is an allocation.

Mr. VANDER SCHAAF. It can be. Some of the proposals listed that it could go from 100 to 0 percent of the record. Some of the contractors knew the split would take place.

Let us say the RFP said you could receive 100 percent of the award or 0 percent of the award. We found that the contractors probably knew that the Government could not actually go 100/0 and knew that the losing contractor would receive a major portion of that award.

They know what the other contractor's ability to produce happens to be. They probably have a good idea of what the prices will be, and, in fact, we felt, in some cases, that prices actually increased. The most efficient producer was able to increase his price as a result of dual resourcing because he knew that the less efficient producer, who was going to receive part of the award, could not meet his price anyway. He was guaranteed a bigger part of the contract by increasing the price.

Senator Gore. Now, the Congress repeatedly tries to get at this gross abuse and passes a law, and then a GS-12 subverts the will of Congress by artificially defining an acquisition in a way that exempts it from the requirements of this law? These GS-12's are not doing this completely on their own, are they?

Ms. Brown. No. I believe they are getting direction and guidance in policy.

Senator Gore. From whom?

Ms. Brown. From the top procurement officials in that service.

Senator Gore. So, the top procurement officials are seeking to circumvent the Truth in Negotiations Act?

Ms. Brown. It is possible that, in some of the more extreme cases, that could be true.

Senator Gore. Well, 30 out of 38 in your audit were improperly handled. It is hard for me to escape the conclusion that they are just bound and determined that they are not going to follow the directives of the Congress, they are not going to obey the law, they are not going to clean up their act, and they are not going to follow, in this case, the Truth in Negotiations requirements.

I think there is a level of arrogance and entrenched determination to keep abusing the system the way it has been abused before some of these reforms were attempted, and I am really shocked by the testimony that we have heard here today.

I know that I am going over time. I appreciate your courtesy, Mr. Chairman.

A major issue also has been the report that your office recently calculated that the Government recovers $19 for every dollar spent on defective pricing audits, which is a pretty good rate of return, but that in spite of that and in spite of the creation of a special DOD task force to supposedly address this matter on a priority basis, virtually nothing has been done.

Have there been cuts in the auditing force at the direction of DOD?

Ms. Brown. There have been some cuts in the audit forces. I must say, however, that they are not out of proportion with the cuts that the other service entities are taking as a result of budget cuts.

Senator Gore. But, it comes counter to this major effort by the country and the Congress expressing the will of the country to have more vigorous audits and more enforcement of the law. I mean, we have got outrageous, rampant abuse in the contracting process down there. The country knows it, the Congress knows it. We try to get something done, and the auditing force is out.

My question is, has DOD forced these cuts in the auditing?

Ms. Brown. I have taken action myself on behalf of some of the services and others and some of the cuts have been restored, so we are not working on it. Chairman Bingaman was just saying that he has also assured that the audit coverage would continue to exist, both in our office and in DCAA, through action by this committee.

Senator Gore. Well, I am glad that you have taken action. On the Truth in Negotiations Act, did you make recommendations for correction there?

Mr. **Vander Schaaf**. Let me give you a little history on that, Senator. Yes, we did.

In 1983, Senator Roth held hearings on this issue. At that time, the Defense Contract Audit Agency was spending 3 percent of its available audit hours, which was a lesser amount than we have today, on defective pricing. We said they ought to double it.

The Defense Contract Audit Agency, at that time, did not want to double it. They did double it. By 1987 they brought it up to 7 percent of their total audit hours. The 7 percent still produced about $19 recovery for every dollar that they spend doing the audit.

That says to us, "Wait a minute, when we use the much smaller level of audit hours, we got $19. We doubled the number of audit hours, we still got $19 back for every audit dollar spent. We ought to keep doing it until the numbers start coming down, until somebody gets their estimating systems fixed out there, and we get this problem behind us." Then we reduce the amount of audit coverage. As long as the return on our investment is as high as it is, our position has been to keep auditing.

Senator **Gore**. But the contractors do not like that.

Mr. **Vander Schaaf**. Oh, absolutely not.

Senator **Gore**. And so consequently a lot of people at the high levels of DOD do not like it either.

Mr. **Vander Schaaf**. There is some truth in what you say, sir.

Senator **Gore**. There is some truth in what you say, too, and I am glad that you are here saying that, but honestly, I find it genuinely shocking. It is a word that is overused around here, but golly days. This is incredible.

Let me come back to the question that I just asked. You all have made recommendations on how to fix the Truth in Negotiations Problem. Is that correct?

Mr. **Vander Schaaf**. The act itself is in good shape, Senator. Those amendments were enacted 2 years ago, and it is tough and it is good.

Senator **Gore**. Well, when were your recommendations made to DOD and how were they received?

Mr. **Vander Schaaf**. I am not sure where the confusion is. The Truth in Negotiations Act itself, those recommendations were made in the 1984–1985 timeframe, and then, in 1986 and 1987, some further amendments were made. And the Truth in Negotiations Act is itself now in the right mode.

The defenses that contractors used, that kept the Government from getting its money back, have been voided. Defenses such as "I was in a superior bargaining position," or "the Government should have known anyway," have been withdrawn and contractors no longer can use those defenses. So the act does not need any further amendment.

We need to audit using the act. That is what we need to do.

Senator **Gore**. Well, your testimony also states that because certain contractors "may be the only available domestic source for specific defense technologies, they may appear to have immunity from punishment for wrongdoing."

Are they in effect immune from punishment for wrongdoing?

Ms. BROWN. What we are referring to there is, if they are the only source, the suspension and debarment is probably not going to be exercised. The Department can take other protective measures to make sure that the contractor acts in a responsible manner. That is just one of a series of things that can be done.

Senator GORE. Like what?

Mr. VANDER SCHAAF. We can take selective suspension and debarment action. If there are officials in a firm that have misbehaved and we have to do business with that firm, we can at least require that those officials be removed from any role in that firm or its business practices. We have been making that concept stick, to some extent, in the Department, and that has been effective.

When you go after a senior vice president or the president of a firm and say, "If you want to keep doing busness with the Government, you can no longer be employed or a part of this firm." That has been shown to be effective.

Ms. BROWN. We can also selectively debar a specified division of a company.

Senator GORE. I am going to finish up here fairly quickly. I just want to underscore some of the things that have jumped out at me as a result of your testimony. First, if the Department is simply not using the authority Congress has given it to save the public's money, they are just not doing it.

Second, the DAR Council is sitting on reforms and actively preventing reforms. Would you agree with that?

Ms. BROWN. I would agree that their inaction, or their restudying of agreed upon action, is preventing decisive conclusions to some of these issues that have remained open for years.

Senator GORE. Are there other areas, other than the ones I have mentioned, where DOD has been given authority to correct procurement problems, where that authority has not been sufficiently utilized?

Ms. BROWN. I think there are a few others mentioned in the statement. A lot of these are individual instances. They surface and as one is fixed, something else comes up. That is one of the reasons for auditing.

I might mention there are many other issues that, of course, have been resolved, and we have had audit results. The Department has taken appropriate action when these problems become visible, and it fixed the problems.

Here we are dwelling on those concerns we have where issues continued to be a problem or even when we have resolution, we are not getting active final decisions made by the Department. We are pushing them to exercise those authorities that are currently in existence and available to them.

Senator GORE. Well, I just think that the public ought to realize that the Inspector General of the Department of Defense, in very carefully prepared testimony stated in moderate tones, is essentially saying to the American people, "Ladies and gentlemen, if you believe that in spite of the outcry for reform in defense procurement, the top officials in the Department of Defense are preventing these reforms from taking place, you are correct. It is not happening."

The Congress has given the authority, has expressed the demand of the American people that DOD clean up its act in acquisition and procurement, but when you look carefully at how the new authority is being handled and what the officials are actually doing, they are sitting on the reforms, they are preventing the changes which need to be made.

In all of this there is a tension between the legislative and executive branches because the Congress, in expressing the will of the people, cannot administer programs. We have to give new authority and direct the executive branch departments and agencies to make changes. But if there is no will to act on the part of the executive branch, then it will not act.

Worse, if there is such a cosy relationship with contractors in a captive perspective on the part of acquisition officials that they adopt the every wish of the contractors and actively subvert these reforms, then you get precisely the kind of situation that you have told us about in this testimony.

We need a breath of fresh air over there, and I hope we will get it. But I appreciate your testimony.

Thank you, Mr. Chairman.

Senator BINGAMAN. Thank you very much.

Senator GORE. Mr. Chairman, can I say one other thing?

Senator BINGAMAN. Sure, go ahead.

Senator GORE. I really think that our subcommittee ought to take this up with the Secretary of Defense. I just cannot abide this kind of testimony without recommending that we directly approach the Secretary and ask for an explanation and ask for corrective action. Thank you.

Senator BINGAMAN. OK, thank you.

You say in your testimony that in this area dealing with fraud, as I understand it, one of the problems has been convincing government contracting personnel with responsibility to initiate these actions, that they have the appropriate authority and flexibility to do so. What needs to be done there by DOD, do we need to have the key acquisition personnel in each service sit down with contracting officers and instruct them as to the options they have to consider these debarment/suspension sanctions? Is that what is needed?

Ms. BROWN. I do not think that would work simply because it is such a huge and complex system. The only way to infiltrate the entire system is to get policy decisions implemented through regulation. When it goes into departmental regulations, the services in turn must update their regulations to include them because that is the guide book that is going to be used.

Mr. VANDER SCHAAF. We have another very positive program in the Department, Senator. It is called the Contractor Risk Assessment Guide. And part of the burden for fixing these problems has to go back to our contractors. We cannot police this entire system. We will never be able to do that.

I think we have made tremendous progress with the industry, in terms of industry attempting to police itself effectively. I do not know if it is being done as effectively as it should, but at least they are heading down that road of policing themselves. This Contractor Risk Assessment Guide is another way. We have given contractors some guidelines. Here is what a good estimated system should have. Here is how your labor should be charged, and here are some guidelines.

If they will adopt those, give us access to their internal control systems and their internal audits so we can see that those programs are in effect and working, then we can back off in our review process. We are attempting to do that. We are trying to do that in a very positive form for the industry to make sure we look at this problem together. I do not want to sound like I am a spokesman for the industry, but we are working on those problems together and positively.

Ms. BROWN. I would like to also say, Mr. Chairman, I have been in this position a little less than 1 year. Secretary Carlucci came in at almost the same time. During that time I have been able to work with him personally, and he has taken a personal interest in many of these things. We have seen many changes and improvements. He is very active in this area, very concerned about it. He was part of the Packard Commission. He is very much aware of procurement issues and problems, and has taken a very personal interest. I have seen very substantial improvements.

We are now looking at those pockets that remain to be fixed, so I do not want to leave this subcommittee with the impression that no action has taken place.

Also, I must say that, for the last 4 months, almost all of the officials that we are speaking of have been very, very immersed in "Ill Wind" investigative issues and trying to take interim actions.

You know, I was fully included in those discussions, so that they were sure that we didn't come up with an entirely different perspective, although we couldn't give them detail as to the investigation going on.

They are very interested in learning what our office can contribute, giving that consideration, and making changes. So, I think we are going in the right direction. However, we are still going to be reporting to the Congress as to those things that have been left undone.

Senator BINGAMAN. I guess I share some of the concerns that Senator Gore has expressed here and Senator Levin. I do think that one of those pockets that, as you say, still needs attention is the DAR Council. That is a pretty big pocket when you are talking about acquisition.

If, in fact, the DAR Council is not acting in response to recommendations and congressional mandates to update acquisition regulations, then we have a big problem in implementing the policy that we are trying to get implemented.

Mr. VANDER SCHAAF. There are a couple of examples here. We ought to clear this up. It was not the DAR Council in every case, Mr. Chairman. On estimating systems, for example, something that our office has been urging contractors do—they have to improve their estimating systems.

The contractors say give us some criteria, give us some guidelines. So, the DAR Council took a long time to do it. It took them 2 years, but they put out some guidelines. The defense management agreed totally with those guidelines and supported us. The General Accounting Office supported us. I thought we had 100 percent approval and out of nowhere, in that particular case, the Office of

Federal Procurement Policy came and said, "Well, it looks like this will cause some paperwork increases. The regulation is not approved."

We did a double take on it. We had not even had any conversations with the Office of Federal Procurement Policy on this issue and it came out of nowhere.

Another one that we mentioned in our statement deals with Federal income tax return and the use of form 1099. Small contractors, individual type contractors who do small jobs on defense installations—for example the cleaners and the people who may do roofing or sidewalk repairs or other small jobs like that—see their pay in the form of a contract payment, and they do not get a W-2 as being a salaried employee.

We did audit work, back in the early eighties. We said, if the Government filed the form 1099 with IRS and showed the IRS that we paid those contractors certain amounts of money, in turn his willingness or likelihood to report that on his Federal income tax increases dramatically.

The PCIE, the President's Council on Integrity and Efficiency, did this Government-wide and said there is $500 to $600 million of possible additional tax revenue there. Ever since, we have again been having trouble getting that implemented and requiring contractors to give us a taxpayer identification number when they get a contract. But, again, the problem is outside of DOD. That one rests, I believe, with OFPP and in other areas in the Government.

I do not know what the problem is, frankly, but we cannot seem to get it accomplished.

Senator BINGAMAN. Well, as I indicated a number of times during the course of your testimony, I tend to agree with your basic conclusion that the authority to deal with the problems you talked about this morning exists, but obviously that is not an adequate answer for it.

When we in the Congress go back to our constituents and they say, "Why are you not fixing these problems?"—if, in fact, DOD cannot take the action, refuses to take the action necessary, then it is incumbent upon us to pass some additional statutes or strengthen the law, some way to mandate the action be taken. Realistically, we are going to go back through your testimony, we are going to try to identify some of those areas that could have been solved, probably should be solved in a regulatory fashion, but may require some kind of legislation, and we are going to get that debate going.

I hope that, by the time the Congress comes back into session in January, the problems will have been resolved, and the need for the legislation will have subsided, but I think it is not responsible for us to just continue sitting on our hands on items that you point out here may have been sitting in the DAR Council for a year without attention.

So, we will be working in the subcommittee on that issue. We will see if there is something that we need to put forward as a legislative suggestion. Realistically, nothing is going to be passed this year in this area, but I think it might be useful to at least identify those things that we know about that need attention and hope that they can be done in the regulatory process. That is my present thinking on it.

I also think Senator Gore's suggestion that we contact the Secretary and express our concern about this is a good one, and we will follow up on that.

Senator GORE. Mr. Chairman, perhaps we could also have a face-to-face meeting with some of these officials, including the ones in the DAR and ask Senator Nunn to join in with us, if that is possible, and ask them directly for an explanation of their inaction and subversion of the reform process and response to some of the other very troubling questions that arise out of the Inspector General's testimony.

Senator BINGAMAN. All right. I thank you all very much. I think it has been very useful testimony.

[Questions for the hearing record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JEFF BINGAMAN

PROFIT RECAPTURE

Senator BINGAMAN. The DOD procurement Task Force has recently revised its approach to recouping profits from tainted contracts. The first approach would allow the Government to recover or recapture profit after a determination that a contract was obtained improperly or illegally. The revised approach indicates that the contract price may be reduced by the amount of any anticipated profit. Does this mean that the Government will not be able to recover profit already obtained by improper means, but only profit to be paid in the future?

Mrs. SPECTOR. The revised Profit Reduction Clause is required in all competitively awarded new contracts over $100,000 when a Competitive Information Certificate is required prior to award. The Government may recover anticipated profit on those contracts containing the clause if the contractor is convicted for violating certain criminal statutes in connection with the contract or the contractor is found to have filed a materially false, incomplete or inaccurate Competitive Information Certificate. The clause will permit the recovery of any anticipated profits paid under the contract and is not limited to future profit to be paid under the contract. The Profit Reduction Clause does not apply to contracts which do not contain the clause. There are other remedies available to the Government if a contract was obtained by improper means but does not include the Profit Reduction Clause. The actions which we can pursue under the law and the Federal Acquisition Regulation include termination and rescission of contracts. The Profit Reduction Clause provides the Government with an additional remedy for misconduct which prevents contractors from profiting from illegal or improper conduct, but enables the Government to obtain the benefit of contract performance.

Senator BINGAMAN. Will the Government be able to recapture profits improperly gained on contracts entered into prior to the time the pre-award certification is required?

Mrs. SPECTOR. Not under the provisions of the Profit Recapture Clause. However, there are remedies under the law and Federal Acquisition Regulation which allow the Government to recover payments made to contractors guilty of wrongdoing. For example, upon conviction for bribery, conflict of interest, etc. a contract may be rescinded and payments recovered from a contractor. If a contractor is determined to have offered or given a gratuity to obtain a contract or favorable treatment, the Government is entitled to terminate the contract and to assess not only damages to the Government but also to assess exemplary damages of three to ten times the amount of the gratuity. The amounts of kickbacks can be offset against money owed under the contract or prime contractors may be directed to withhold money owed subcontractors. The actions we may take depend on the factual circumstances.

Senator BINGAMAN. How can the contractor defend himself against a determination to reduce profit due to improper or illegal activity? Does the contractor have the right to see the evidence that is the basis for the determination? Is the contractor entitled to a hearing? Who will determine that the contract price should be reduced and to what review is this determination subject?

Mrs. SPECTOR. The Profit Reduction Clause provides that prior to reducing the contract price by the amount of any anticipated profit, the contractor shall be provided with a written statement of the action being considered and the basis therefor. The contractor will then have not less than 30 calendar days after receipt to submit information and argument in opposition to the proposed reduction. The determination that the contract price should be reduced is made by the Secretary of Defense or his designee. The Secretary retains the discretion, based upon good cause shown, to reduce the contract price by less than the amount of anticipated profit. The contractor may seek a court review of the decision to reduce the contract price.

ORGANIZATIONAL CONFLICT OF INTEREST

Senator BINGAMAN. What is the status of the recommendation in the July report of the DOD task force that organizational conflict of interest clauses be developed to provide uniform coverage ensuring that consultants working for DOD are not placed in a conflict of interest role with consulting work they are performing for private firms? Do current laws and regulations not proscribe such activity?

Mrs. SPECTOR. Subpart 9.5 of the Federal Acquisition Regulation [FAR] contains the policy for contracting officers to identify and avoid organizational conflicts of interest. We had started a review to strengthen the FAR provisions. However, the fiscal year 1989 Defense Appropriations Act (P.L. 100-463) requires the Office of Federal Procurement Policy (OFPP) to issue a policy with government-wide regulations to be issued thereafter, on the registration, certification and enforcement requirements as may be appropriate. This provision of law has overtaken the internal DOD efforts. We will cooperate with OFPP in issuing the required regulations.

SELF-GOVERNANCE

Senator BINGAMAN. How can DOD encourage the development of strong, effective internal controls by contractors so that there can be less reliance on direct oversight and auditing? What type of cooperation is needed from the contractor and from DOD?

Mrs. SPECTOR. It is essential that Defense contractors conduct themselves with the highest degree of integrity and ethics. Therefore, DOD supports any program which emphasizes the importance of this and is effective in reducing the wrongdoing that apparently exists to some degree in every organization or institution.

In implementation of the Packard Commission recommendation to promote more self-governance programs among defense contractors, the Defense Federal Acquisition Regulation DFARS 3.70 states that contractors should have standards of conduct and internal control systems commensurate with the size of the company to provide for such things as:

—Written code of business ethics and conduct and an ethics training program for all employees

—Procedures for employees to report apparent misconduct without fear of reprisal

—Disciplinary action for improper conduct

—Timely reporting to Government officials of any wrongdoing.

The Inspector General recently reported that of the 46 signatory companies to the Defense Industry Initiative developed by industry, 37 were under investigation. Of these, 27 had made voluntary disclosures.

This is clear evidence that the program is effective in reporting wrongdoing. With time, it will be even more effective in preventing it.

CONTRACTOR RISK ASSESSMENT GUIDE PROGRAM

Senator BINGAMAN. A recent DOD report on the reduction of duplicative oversight indicates that a program has been established to encourage internal control systems by contractors to replace the need for extensive DOD audits. The Secretary has reportedly sought to enlist the 100 largest defense contractors in this program. What is its current status and what standards will contractor internal control systems be required to meet?

Mrs. SPECTOR. This program, known as the Contractor Risk Assessment Guide [CRAG] program, has virtually completed its development phase, and implementation is about to commence. The CRAG is a joint DOD—industry program aimed at eliminating duplicative or unnecessary DOD oversight by placing more reliance on effective systems of contractor internal control. The Secretary's May 9, 1988, letter forwarded a draft of the CRAG document to over 100 major defense contractors and industry associations for review and comment. Over eighty substantive responses were received. These industry comments and recommendations were analyzed in a joint DOD-industry forum and were used to strengthen and improve the CRAG. The Council of Defense and Space Industry Associations [CODSIA] played an instrumental role in this process. We are now preparing to distribute the final CRAG and to invite industry to join us in commencing the implementation process.

Standards for effective internal control systems are prescribed in the CRAG. They consist of a series of mutually agreed upon control objectives, major controls, and commonly used control procedures in each of the CRAG's current five chapters, i.e., indirect cost submissions, labor charging, material management and accounting systems, estimating systems, and purchasing. To be judged an effective system and thus enable direct DOD oversight to be reduced in the particular area, a contractor's internal control system must meet several criteria. In addition to addressing the control objectives and major controls, it must include documentation and testing procedures which can be used by the contractor as well as DOD to verify that the control system is functioning properly.

The CRAG is in the nature of a self-governance program and is strictly voluntary. Contractors are being encouraged to participate, and we believe that a great many will do so in order to help eliminate duplicative or unnecessary DOD oversight, but we do not believe it would be cost-effective to attempt to mandate participation in the CRAG.

ORGANIZATIONAL CONFLICT OF INTEREST

Senator BINGAMAN. Would more complete disclosure of a consultant's financial interests than presently available through DD Form 1555 better protect the interests of the public and the Government?

Mrs. SPECTOR. This area will be studied during the development of government-wide regulations by the Office of Federal Procurement Policy as required by the fiscal year 1989 Defense Appropriations Act.

DOD STEPS TO MINIMIZE INTERVENTION POINTS

Senator BINGAMAN. Secretary Carlucci stressed the importance of reducing the potential for improper intervention in the weapons acquisition process.

Please describe the intervention points within DOD and the steps you are taking to reduce the potential for improper intervention.

Mrs. SPECTOR. There appears to be an inordinate amount of attention directed to the source selection process. We must have a fair and effective system to select the best source for the job in our judgment. However, as Secretary Carlucci has said there are intervention points in the system that can be used to affect source selection decisions. The 2-year budget cycle would help stabilize program funding and would eliminate some of these intervention points.

We are also examining our internal DOD process to eliminate intervention points that could improperly affect source selection determination. In this regard we have limited the use of multiple best and final offers which on occasion may have focused undue pressure on the competitive process.

SOURCE SELECTION REGULATIONS

Senator BINGAMAN. DOD officials have noted on several occasions that the Department is making a compilation of source selection regulations. This process has been ongoing for some time now. Can you tell us why the regulations are not readily located and easily compiled?

What steps are you contemplating to clarify and consolidate these laws?

When would you expect that process to be completed?

Mrs. SPECTOR. Source selection provisions are found primarily in the Federal Acquisition Regulation Draft Compendia of various laws and regulations regarding collusive bidding, specifications and disclosure of data have been developed by the Task Force and provided to the Chairmen of the Armed Services Committees in the Second Report to Congress dated October 3, 1988.

CONSULTANTS TO CONTRACTORS

Senator BINGAMAN. On the subject of consultants, two areas have been identified as possibly in need of further attention:

First, potential conflicts of interest by consultants to DOD's own consultants.

Second, potential conflicts of interest by consultants who assist offerors in preparing bids and proposals.

What are you doing to clarify standards applicable to these two groups and to develop procedures for identifying and evaluating conflicts of interest?

Mrs. SPECTOR. While the DOD has been developing provisions to address consultant contracting, these efforts are being subsumed into the effort by the Office of

Federal Procurement Policy to develop government-wide regulations as required by the fiscal year 1989 Defense Appropriations Act.

OFPP REAUTHORIZATION—ROLE OF THE COUNCIL

Senator BINGAMAN. The House version of the OFPP Reauthorization would remove the authority to issue rules from the agencies actually involved in procurement and place it in a Council chaired by the Administrator of OFPP. The Administrator would be empowered to override the Council on any issue, which would effectively make the administrator the regulatory czar in the procurement area. What would be the impact of the House bill on DOD's ability to initiate and implement timely and effective procurement reforms?

Mrs. SPECTOR. DOD objects to this and other provisions in the House bill. The President, Congress and the public look to the Secretary of Defense to assure the soundness of the DOD acquisition system. It is inconsistent with this responsibility to have to negotiate with GSA, NASA and the administrator of OFPP before procurement policies and regulations that the Secretary believes are necessary can be put into effect. In addition, to the extent that it is deemed inconsistent with the FAR, any regulation that is published by the Department of Defense will cease to be effective after 6 months unless the administrator of OFPP approves an extension. This automatic expiration of a regulation is unworkable and precludes meaningful attempts to act quickly and effectively to ensure that DOD procurement is conducted properly. These provisions of the House bill take from the Secretary of Defense the authority he needs to assure the DOD procurement system is sound, but he remains responsible for the system. This separation of authority and responsibility violates a basic principle of good management.

OFPP REAUTHORIZATION—SUSPENSION AND DEBARMENT

Senator BINGAMAN. The House version of the OFPP reauthorization would remove the ability of agency officials to take debarment action in procurement integrity cases, and would give that authority to the Boards of Contract Appeals, with the full panoply of judicialized procedures used by the Boards. What would be the impact of the House bill on DOD's ability to initiate and implement timely and effective debarment actions?

Mrs. SPECTOR. We believe that transferring the authority to determine whether a contractor should be debarred to the Board of Contract Appeals and judicializing the procedures is inappropriate. Such actions are presently taken for the purpose of protecting the Government's interests by contracting only with responsive contractors and are not taken for the purpose of punishment. Although contractors are given an opportunity to present information on their behalf, debarment actions are not judicialized proceedings. Suspension and debarment are administrative remedies with respect to which the contracting agencies have developed considerable expertise and can be accomplished in an efficient and timely fashion. The delays and burdens inherent in the judicialized process contemplated by the House bill will not permit the prompt action required to protect the Government's interests.

REVOLVING DOOR LEGISLATION

Senator BINGAMAN. Your testimony states that DOD needs to tighten enforcement of the revolving door legislation and notes that "DOD still has not fully implemented its new standards of conduct regulation." What further action is needed to ensure that this legislation can be adequately enforced?

Ms. BROWN. The first step is to ensure that the legislation has been fully incorported into the regulations issued by the Military Departments and Defense Agencies. It is those regulations to which DOD personnel look for guidance relating to their performance of duties, to include standards of conduct. The DOD took the first step in this process on May 6, 1987 through the issuance of the DOD Directive 5500.7, "Standards of Conduct." Some DOD components have implemented the Directive by incorporating its requirements into their individual regulations. Others have yet to do so.

Other means for ensuring adequate enforcement of the legislation would be through implementation of recommendations made in our "Report on Gratuities and Standards of Conduct Relating to DOD Procurement" as well as in other forums. Those recommendations include specifically tailored training programs for procurement personnel and increased emphasis on obtaining written opinions from ethics officials, which could then be used to insure consistency and quality of their advice. It is only through an effective educational program and consistent approach in dealing with issues relating to legislation that adequate enforcement can be achieved.

EFFECTIVE INTERNAL CONTROLS BY CONTRACTORS

Senator **Bingaman**. How can DOD encourage the development of strong, effective internal controls by contractors so that there can be less reliance on direct oversight and auditing? What type of cooperation is needed from the contractor and from DOD?

Ms. **Brown**. Historically, the Defense Contract Audit Agency [DCAA] has performed various types of reviews of contractor operations to identify improvements needed in contractor internal control systems. Such audits include cost estimating system reviews, accounting system reviews, and internal control reviews. The Contractor Risk Assessment Guide [CRAG] is an attempt to inform contractors of what control objectives the Government expects an effective contractor internal control system to address, and to encourage the development of such controls. For the CRAG approach to succeed, contractors will have to be willing to implement effective systems and to furnish documentation (both of the systems themselves and of the results of system tests) to the DCAA. If that documentation is sufficient to allow the DCAA to declare the systems as adequate, the Government must be willing to accept the approved systems as a substitute for direct Government oversight. The DOD is willing to uphold its end of the arrangement, and we are hopeful that a large number of contractors will participate.

CIRCUMVENTING INTENT OF PROCUREMENT REGULATIONS

Senator **Bingaman**. Your testimony states that "the services are attempting to circumvent the intent of the (procurement) regulations in trying to represent a production decision as being for low rate, when in reality, it is a full rate production decision—one that requires substantially more documentation and testing than is being provided." What is the extent of the problem and what steps are being taken to correct it.

Mr. **Vander Schaaf**. We selected five weapon systems for audit as part of our fiscal year 1988 Review of the Defense Acquisition Board [DAB] process. These were the SSN-21 submarine, Follow-On UHF satellite, T-45 training system, AMRAAM missile, and C-17 aircraft. A separate report will be issued on each system.

Only one final report has been issued to date, the AMRAAM missile. The Air Force sought approval for procurement of long leadtime items for the first lot of full-rate production. We identified this decision to procure about 50% of the estimated cost of the entire lot as a tacit full-rate production decision lacking the required operational test results and independent cost estimate. The Air Force nonconcurred with our AMRAAM finding with respect to low-rate versus full production. However, the Air Force has not proceeded with the long leadtime procurement of Lot III.

The remaining weapon system reports are drafts or preliminary drafts that have not yet been completed and staffed for comment. Our past DAB audits did not show that production decisions as being for low rate were in reality full-rate production decisions. We plan to issue a final DAB audit report in the summer of 1989, summarizing audit results on all five systems. Concerns regarding low-rate decisions that are really full production decisions will be addressed in that report.

OFPP REAUTHORIZATION—ROLE OF THE COUNCIL

Senator **Bingaman**. The House version of the OFPP reauthorization would remove the authority to issue rules from the agencies actually involved in procurement and place it in a Council chaired by the Administrator of OFPP. The Administrator would be empowered to override the Council on any issues, which would effectively make the Administrator the regulatory czar in the procurement area. What would be the impact of the House bill on DOD ability to initiate and implement timely and effective procurement reforms?

Ms. **Brown**. The DOD ability to initiate and implement timely and effective procurement reforms would probably be impeded if the Department lost its rule making authority. The IG, DOD, has been very critical of the Defense Acquisition Regulation Council for not being as timely and responsive to DOD management guidance as it could be. Those problems with the DAR Council are not insoluble, however, and it is by no means clear that a Government-wide Council chaired by OFPP would be any more timely and responsive than the DAR Council. In fact, our recent experiences on rules for contractor cost estimating systems and tax information indicate that we may find it even more difficult to press for timely, effective action through a Government-wide Council and OFPP.

OFPP REAUTHORIZATION—SUSPENSION AND DEBARMENT

Senator **Bingaman**. The House version of the OFPP reauthorization would remove the ability of agency officials to take debarment actions in procurement integrity cases, and would give that authority to the Boards of Contract Appeals, with the full panoply of judicialized procedures used by the Boards. What would be the impact of the House bill on DOD's ability to initiate and implement timely and effective debarment actions?

Ms. **Brown**. Suspension and debarment is a "business" decision of DOD which focuses on whether DOD wants to do business with a contractor or individual who has engaged in fraudulent or nonresponsible conduct. This contracting decision is a tool used by agency managers to secure the necessary supplies and weapons in a timely manner to support the armed forces, while at the same time ensuring that DOD is dealing with responsible contractors.

The present suspension/debarment decisions are integrally linked to the DOD coordination of remedies process, which enables us to centrally coordinate the appropriate administrative, contractual, civil, or criminal action. This centralized approach provides DOD the necessary flexibility in working with contractors to ensure appropriate actions are taken in responsibility/integrity issues while taking into consideration current procurement needs.

The impact of giving the suspension/debarment decision authority to the Board of Contract Appeals on the DOD ability to initiate and implement timely and effective debarment action would be extremely harmful for the following reasons:

A. The Board of Contract Appeals is not equipped to make business decisions based on "present responsibility." The Board of Contract Appeals is not part of agency management.

B. The Board of Contract Appeals is isolated and apart from a centralized coordination of remedies process. Its decisions will be made in isolation of the administrative, contractual, civil, and criminal remedies available to the Government.

C. The Board of Contract Appeals is isolated from the free flow of information obtained by suspension and debarment officials from investigators, auditors, and contracting officials.

D. The Board of Contract Appeals as an administrative judicial authority makes decisions based on a historical record often years old and is not equipped to make timely responsibility determinations based on present needs.

E. The Board of Contract Appeals decisions are judicial decisions incumbent with the protracted delays caused by litigation in an adversarial setting.

F. The suspension and debarment decision is a management decision made under the authority of the department head by a designated agency official. The Board of Contract Appeals authority does not come from the agency head, but is derived from the Contract Disputes Act.

G. The Contract Disputes Act precludes contracting officers of the Board of Contract Appeals from making decisions regarding fraud.

In summary, the present system works to protect the DOD need to contract with responsible contractors. Removal of the authority to the Board of Contract Appeals will create a chaotic, ineffective, untimely substitute. It will be impossible for the Department of Defense to protect the taxpayers' dollars in a timely fashion.

AMRAAM PRODUCTION

Senator **Bingaman**. The IG's testimony recommends that the Under Secretary of Defense for Acquisition withhold full-rate production on the AMRAAM until the Air Force provides favorable operational test results and an independent cost estimate, but that the Under Secretary nonconcurred. I understand, however, that the Department will not proceed with the long leadtime procurement of Lot III. Is that correct?

Mr. **Vander Schaaf**. The Under Secretary did, in fact, nonconcur with our AMRAAM draft report recommendation to maintain low-rate production with Lot III. However, DOD has not yet proceeded with the long leadtime procurement of Lot III. The DAB plans to consider release of long lead funds for Lot III only after a review of AMRAAM flight test data.

A committee to review this data met on September 15, 1988, but did not reach a decision regarding sufficiency of favorable test data. Subsequently, the Air Force was requested to provide more test data, and to provide long leadtime costs for various missile quantities ranging from 400 to 1200. The committee has not reviewed this additional data. We plan to continue monitoring this matter.

Senator BINGAMAN. If the Under Secretary nonconcurred, how was this decision made?

Mr. VANDER SCHAAF. The Under Secretary stated that the DAB has not yet approved either long-lead or low-rate production of Lot III and that the reduction in Lot III quantities from 2000 to the current 1270 brought about a de facto low-rate initial production lot.

However, it should be noted that the Director, Operational Test and Evaluation, by memorandum dated September 21, 1988, disagreed. He determined that ". . . a Lot III quantity of more than 900 missiles would constitute full rate production and therefore, the quantity procured should be no more than this." He further stated, "I firmly believe in the need for and potential capability of the AMRAAM. However, the required capability can only be achieved by continued development, test and evaluation."

Senator BINGAMAN. Would this decision have been made the same way if the IG had not conducted the review?

Mr. VANDER SCHAAF. Many factors are considered before the DAB makes its recommendations. Our report was fully discussed with the DAB members' staffs and issued to DAB members and their staffs before the decision was made. I believe that the IG report played an important role in the decision process.

Senator BINGAMAN. The hearing is concluded.

[Whereupon, at 11:02 a.m., the hearing was adjourned.]

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